TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 419.

THE TERRITORY OF NEW MEXICO *EX REL.* CALEDONIAN COAL COMPANY, APPELLANT,

vs.

Ira A. Abbott,

~~BENJAMIN S. BAKER~~, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO AND JUDGE OF THE SECOND JUDICIAL DISTRICT COURT THEREOF, &c.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED NOVEMBER 3, 1904.

(19,519.)

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vs.

BENJAMIN S. BAKER, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO AND JUDGE OF THE SECOND JUDICIAL DISTRICT COURT THEREOF, &c.

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INDEX.

	Original.	Print.
Caption	1	1
Order granting leave to file petition for writ of mandamus	1	1
Petition for a writ of mandamus	2	1
Order for rule to show cause	6	4
Return to rule	7	5
Order taking cause under advisement	12	9
Judgment	12	10
Order allowing appeal	13	10
Opinion	14	11
Clerk's certificate	18	14
Assignment of errors	19	14

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 27, 190

1 Be it remembered, that heretofore, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, the seat of government, on the first Wednesday after the first Monday in January, A. D. 1904, on the twenty-third — of the said regular term, the same being the 12th day of September, A. D. 1904, the following among other proceedings were had and entered of record, to-wit:

TERRITORY *ex Rel.* CALEDONIAN COAL COMPANY, Relator, *vs.* Hon. BENJAMIN S. BAKER, Associate Justice, etc., *et als.*, Respondents.	No. 1063.	Mandamus.

Now comes Neill B. Field, Esq., attorney for the relators herein, and asks leave of the court to file a petition for a mandamus against the Honorable Benjamin S. Baker, associate justice, etc. *et al.*, and there being no objection, it is ordered by the court that the said relator herein be and *he* hereby is granted leave to file *his* said petition herein.

And afterwards, on to wit the 12th day of September, A. D., 1904, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, a petition for mandamus, against the Honorable Benjamin S. Baker, associate justice, etc., *et als.*, which said petition for mandamus, is in words and figures following to-wit:—

2 TERRITORY OF NEW MEXICO:

In the Supreme Court, Adjourned January Term, 1904.

To the honorable chief justice and associate justices of the supreme court of the Territory of New Mexico:

The Caledonian Coal Company, a corporation organized and existing under the laws of the Territory of New Mexico, informing, shows to the court that heretofore, to-wit, on the 17th day of February, 1904, it commenced an action in the district court of the second judicial district of the Territory of New Mexico, sitting for the trial of causes arising under the Constitution and laws of the United States, against the Santa Fe Pacific Railroad Company, the Atchison, Topeka and Santa Fe Railway Company, the Colorado Fuel and Iron Company and the American Fuel Company, seeking to recover damages for alleged violations of the act of Congress entitled "An act to regulate commerce," approved February 4th, 1887, and the various acts amendatory thereof, and also the act of Congress entitled "An act to protect trade and commerce against unlawful re-

straints and monopolies," approved July 2d, 1890, and such proceedings were had therein that on to-wit, the 13th day of May, 1904, a summons duly issued out of the office of the clerk of the district court of the second judicial district was duly served upon the said defendant, The Santa Fe Pacific Railroad Company, by the United States marshal for the Territory of New Mexico, who made return thereon in the following language:

"I, C. M. Foraker, United States marshal for the Territory of New Mexico, do hereby certify that I received the within summons on the 31st day of March, 1904, * * * I further certify that I served the said summons on the defendant, The Santa Fe Pacific Railroad Company, at the second judicial district aforesaid, on the 13th day of May, 1904, by delivering a true copy thereof, with a copy of the complaint thereto attached, to E. P. Ripley, president of the said defendant corporation."

Relator further shows that at the time of the service of the said summons upon the said E. P. Ripley, he, the said E. P. Ripley, was president of the said Santa Fe Pacific Railroad Company, which is a corporation created, organized and existing under the provisions of an act of the Congress of the United States, entitled "An act to define the rights of purchasers under mortgages authorized by an act of Congress approved April twentieth, eighteen hundred
3 and seventy-one, concerning the Atlantic and Pacific Railroad Company," approved March 3d, 1897, and the said Santa Fe Pacific Railroad Company was, at the time of the commission of the grievances in the said cause alleged, the owner of a line of railroad within the said second judicial district and elsewhere within the Territory of New Mexico, but which, at the time of the institution of this suit, had been sold and transferred to, and is operated by, its co-defendant, The Atchison, Topeka and Santa Fe Railway Company, under a conveyance authorized to be made by an act of the Congress of the United States entitled "An act authorizing the Santa Fe Pacific Railroad Company to sell or lease its railroad property and franchises, and for other purposes," approved June 27th, 1902, and was and still is the owner of several hundred thousand acres of land within the second judicial district aforesaid, and the said Santa Fe Pacific Railroad Company was and is prosecuting, and there were and are actually pending in the district court of the county of Bernalillo in the Territory of New Mexico, within said district, suits in relation to the title and right of possession of the said Santa Fe Pacific Railroad Company to parts and parcels of the land aforesaid; that all of the said lands were acquired by the said Santa Fe Pacific Railroad Company as the successor of the Atlantic and Pacific Railroad Company, to which they were granted by an act of the Congress of the United States, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866, and the said Santa Fe Pacific Railroad Company, as such successor, acquired all of the rights, privileges

and franchises which had been theretofore granted to the Atlantic and Pacific Railroad Company, including the right of eminent domain within said Territory of New Mexico.

Relator further shows that it is advised by counsel and therefore charges the fact to be that by reason of the facts hereinbefore alleged, the said Santa Fe Pacific Railroad Company is an "inhabitant" of the second judicial district aforesaid, and by reason of the presence of its president, E. P. Ripley, within the Territory of New Mexico, and within the second judicial district aforesaid, the said Santa Fe Pacific Railroad Company was "found" within the said second
4 judicial district, within the meaning of the said acts of Congress, and by reason of the service of the process as aforesaid upon the said E. P. Ripley, as president as aforesaid, became subject to the jurisdiction of the district court of the second judicial district, sitting for the trial of causes arising under the Constitution and laws of the United States, but, notwithstanding the facts hereinbefore alleged, the Honorable Benjamin S. Baker, associate justice of the supreme court of the Territory of New Mexico, and judge of the district court of the second judicial district thereof, did, on the 29th day of August, 1904, quash the said marshal's return of the said process so far as the same related to the said defendant, The Santa Fe Pacific Railroad Company, and did refuse to assume jurisdiction of the said cause so far as the said defendant, The Santa Fe Pacific Railroad Company is concerned, and did refuse to require the said defendant, The Santa Fe Pacific Railroad Company, to answer the declaration or complaint in said cause, to the manifest wrong and injury of your relator.

Your relator craves leave to refer to each and every of the said acts of Congress hereinbefore mentioned, and prays that the same and each of them may be taken and considered as part of this information with the same effect as if the same and each of them had been fully and at large set forth and incorporated herein, and brings into court copies of each and every of said acts of Congress for inspection by the court in the premises.

Wherefore your relator prays that an alternative writ of mandamus may issue, directed to the Honorable Benjamin S. Baker, associate justice of the supreme court of the Territory of New Mexico, and judge of the district court of the second judicial district thereof, commanding and directing him, and the said district court of the second judicial district, sitting for the trial of causes arising under the Constitution and laws of the United States, over which he presides, to assume jurisdiction over the said cause so far as the same relates to the said defendant, The Santa Fe Pacific Railroad Company, and to order and direct the said Santa Fe Pacific Rail-
5 road Company to plead, answer or demur therein, within such reasonable time as may be fixed by the said court, and to proceed with said cause so far as said defendant, The Santa Fe Pacific Railroad Company, is concerned, as law and justice may require, and to show cause before this honorable court at some early

day to be fixed, why the said alternative writ of mandamus should not be made peremptory, and your said relator will ever pray etc.

NEILL B. FIELD,
Attorney for Relator.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

Neill B. Field, of lawful age, being first duly sworn, on his oath deposes and says, that he is attorney for the relator in the foregoing information; that he has read the same and knows the contents thereof, and verily believes the allegations therein to be true.

NEILL B. FIELD.

Subscribed and sworn to before me by Neill B. Field this 8th day of September, 1904.

[NOTARIAL SEAL.] FRANK H. MOORE,
Notary Public, Bernalillo County, New Mexico.

6 And afterwards, on to-wit, on the twenty-fourth day of the said regular term of the supreme court of the Territory of New Mexico, the same being the 12th day of September, A. D., 1904 the following among other proceedings were had and entered of record, to-wit:

TERRITORY *ex Rel.* CALEDONIAN COAL CO., Relator,
vs.
Hon. BENJ. S. BAKER, Associate Justice, etc., *et al.*, Respondents. } No. 1063. Mandamus.

This cause coming on to be heard upon the petition of relators herein, for a rule on the respondents herein to show cause why a peremptory writ of mandamus should not issue against them in the premises herein, and the same having been argued by counsel, and submitted to and taken under advisement by the court, and the court being now sufficiently advised in the premises, grants the said petition; it is therefore considered and adjudged that a rule do issue upon the said Honorable Benjamin S. Baker, associate justice etc. *et als.*, commanding them to show cause forthwith, why a peremptory writ of mandamus should not issue against them in the premises herein.

And afterwards, on to-wit, the 13th day of September, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, a return herein, which said return was and is in words and figures, following to wit:—

7 In the Supreme Court of New Mexico, Adjourned Term of January, 1904.

THE TERRITORY OF NEW MEXICO *ex Rel.* THE CALEDONIAN COAL COMPANY, Relator,
vs.
The Hon. BENJAMIN S. BAKER, Associate Justice of the Supreme Court, and the District Court for the 2nd Judicial District, Respondent. } No. —.

To the honorables the chief justice and the associate justices of the supreme court of the Territory of New Mexico:

Now comes Benjamin S. Baker, associate justice of the supreme court of the Territory of New Mexico, and judge of the second judicial district court therof, and said district court, and for *return* to the rule to show cause why a peremptory writ of mandamus should not issue, heretofore issued by said supreme court against him, on application and information of the Caledonian Coal Company, says:

1st. That it is true that heretofore, to wit, on the seventeenth (17th) day of February, A. D. 1904, the said The Caledonian Coal Company commenced an action in the district court of the second judicial district of the Territory of New Mexico, sitting for the trial of causes arising under the Constitution and laws of the United States, against The Santa Fe-Pacific Railroad Company and the other defendants named in the petition herein, in which petition it was sought to recover damages for alleged violations of the act of Congress entitled "An act to regulate commerce," approved February 4th, 1887, and the various acts amendatory thereof, and also the act of Congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2nd, 1890; and that it is true that such proceedings were had
8 therein that on the thirteenth (13th) day of May, A. D. 1904, a summons duly issued out of the office of the clerk of the district court of the second judicial district; but this respondent denies that the same was duly or otherwise served upon the said defendant, The Santa Fe-Pacific Railroad Company, by the United States marshal for the Territory of New Mexico; but this respondent states that the said United States marshal made return upon said summons in manner and form as set out in the petition of relator herein.

2nd. That thereafter such proceedings were had in said cause that the said Santa Fe-Pacific Railroad Company entered its special appearance therein and filed its motion to quash the return of service and service of process upon the defendant, The Santa Fe-Pacific Railroad Company, which said special appearance and motion are in words and figures following, to wit:

"In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting for the Trial of Causes Arising under the Constitution and Laws of the United States.

THE CALEDONIAN COAL COMPANY, Plaintiff,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *et als.*, Defendants. } No. 1183.

Special appearance and motion to quash return of service and service of process upon the defendant The Santa Fe Pacific Railroad Company.

Now comes the defendant, The Santa Fe Pacific Railroad Company, by R. E. Twitchell, its attorney, and enters its appearance herein specially for the purposes of this motion and no other purpose, and moves the court to quash the service of process herein and the return thereon, on the following grounds:

1. That the said service of process was pretended to be made upon one E. P. Ripley, the president of the said company, who at the time of the pretended service of said process, to wit, on May 9, 1904, was only casually in the Territory of New Mexico and was merely passing through the Territory of New Mexico, en route from the State of California to the city of Chicago, in the State of Illinois.

2. That the pretended service upon the said E. P. Ripley was made when the said E. P. Ripley was not in the Territory of New Mexico representing the defendant railroad company in any capacity whatever, and said service was attempted and pretended to be made when the said E. P. Ripley was only temporarily within the Territory of New Mexico.

3. That the said E. P. Ripley, upon whom the pretended service of said process was attempted to be made, is a non-resident of the Territory of New Mexico and does not reside within the Territory of New Mexico nor have his place of domicile therein, and when the pretended service was attempted to have been made upon him, the said E. P. Ripley was not present in the Territory of New Mexico officially as the president of the said Santa Fe Pacific Railroad Company, nor representing the said corporation in its business in said Territory of New Mexico.

4. That the said E. P. Ripley is not a proper person upon whom process should be served within the Territory of New Mexico.

9 5. That the said defendant company has no railroad property in the Territory of New Mexico, and is a corporation existing under and by virtue of an act of the Congress of the United States, and by means thereof it is not necessary to appoint an agent in the Territory of New Mexico upon whom process may be served.

6. That the right of the Santa Fe Railroad Company to do business in the Territory of New Mexico is derived from the Congress of

the United States and not from the Territory of New Mexico, and that the laws governing the service of process upon corporations in the Territory of New Mexico do not apply and are not applicable to the said defendant, The Santa Fe Pacific Railroad Company.

7. That the said pretended service of process is wholly illegal and void and of no effect in law and it is not sufficient for the court to acquire jurisdiction over the said defendant, The Santa Fe Pacific Railroad Company.

R. E. TWITCHELL,
Attorney for Defendant, The Santa Fe Pacific Railroad Company."

3rd. That thereafter the said motion last above set forth having come on for hearing in said district court, there was filed and presented to the court in support thereof an affidavit, which said affidavit was and is in the words and figures following, to wit:

"In the District Court for the Second Judicial District of the Territory of New Mexico for the Trial of Causes Arising under the Constitution and Laws of the United States.

CALEDONIAN COAL COMPANY, Plaintiff,
vs.
SANTA FE PACIFIC RAILROAD COMPANY, THE ATCHISON, Topeka and Santa Fe Railway Company, Colorado Fuel and Iron Company, and The American Fuel Company, Defendants. } No. 1183.

Affidavit.

STATE OF ILLINOIS, }
County of Cook, } *ss:*

E. P. Ripley, being first duly sworn, upon his oath deposes and says that he is the president of the Santa Fe Pacific Railroad Company, and was such president on the 12th day of May, 1904, when summons in the above action was served upon him while he was passing through the Territory of New Mexico as a passenger upon one of the trains of the Atchison Topeka and Santa Fe Railway Company. He further states that in the articles of incorporation, incorporating the Santa Fe Pacific Railroad Company, under the act of March 3, 1897, no place is fixed for keeping the principal office or place of business of said railroad company, as none was required to be stated in said act of Congress, but that the by laws of said Santa Fe Pacific Railroad Company require annual meetings of its board of directors to be held at the office of said company in the city of New York. He further states that since the sale of the railroad of the Santa Fe Pacific Railroad Company, said Santa Fe Pacific Railroad Company has had no property except the lands ac-

quired by it under foreclosure proceedings under a mortgage of the Atlantic and Pacific Railroad Company and which remains undisposed of; that its land commissioner has his office in the city of Topeka, State of Kansas. This affiant, as president of the Santa Fe Pacific Railroad Company, has and has had heretofore his office in the city of Chicago and State of Illinois. He further states that since the sale of its said railroad, said Santa Fe Pacific Railroad Company has had no office or place of business in the Territory of New Mexico.

And further deponent saith not.

E. P. RIPLEY.

Sworn to before me and subscribed in my presence this 1st day of June, 1904. My commission expires April 17th, 1905.

EDWARD J. ENGEL,
Notary Public."

10 4th. That the said affidavit last above set forth and the facts therein alleged were in no wise controverted by the said relator herein, plaintiff in said cause, although the said relator herein, as plaintiff in said cause, upon said hearing, also submitted proofs to the effect that the Santa Fe-Pacific Railroad Company had instituted and was prosecuting actions in ejectment in the district court against trespassers upon its property in the Territory of New Mexico, it appearing that said suits were instituted by the said Santa Fe-Pacific Railroad Company prior to the sale of its railroad property and franchises to the Atchison Topeka & Santa Fe Railway Company; all of which said proofs both for and against the said motion to quash, were offered and received without objection by either party to said cause.

5th. That thereafter, upon briefs submitted by counsel for the relator herein and for the said Santa Fe-Pacific Railroad Company, your respondent being fully advised in the premises and having given due and full consideration to the merits of said motion to quash, sustained the same and quashed the return of service and service of process upon the said defendant, The Santa Fe-Pacific Railroad Company.

6th. And your respondent further states that, upon the proofs submitted and upon which proofs, together with the arguments and authorities to it presented, your respondent sustained the motion to quash hereinbefore mentioned, your respondent held that the said Santa Fe-Pacific Railroad Company was not an inhabitant of the second judicial district aforesaid, and was not by reason of the casual presence of its president E. P. Ripley within the Territory of New Mexico or within the second judicial district thereof, and held and determined that the said Santa Fe-Pacific Railroad Company was not found within the said second judicial district within the meaning of any act of the Congress of the United States or the laws of the

Territory of New Mexico, and held and adjudged that by reason of the alleged service of process upon the said E. P. Ripley, president of said railroad company, the said Santa Fe-Pacific Railroad Company was not subjected to the jurisdiction of the said district court of the
11 said second judicial district, which said order sustaining said motion to quash was made and entered of record by your respondent on the 29th day of August, A. D. 1904; and respondent further denies that said order quashing the service of process and the return thereof, and its refusal to assume jurisdiction of the said cause so far as the said defendant, The Santa Fe-Pacific Railroad Company, is concerned, and the refusal of your respondent to require the said Santa Fe-Pacific Railroad Company to answer the declaration or complaint in said cause, was to the manifest wrong or injury of the relator herein.

Wherefore by reason of the law and the facts in this case, your respondent says that he ought not to be compelled by a writ of mandamus to assume jurisdiction over the said cause so far as the same relates to the said defendant, The Santa Fe-Pacific Railroad Company, and that he ought not to be compelled to order or direct the said Santa Fe-Pacific Railroad Company to plead, answer or demur therein, nor to proceed with said cause so far as said defendant, The Santa Fe-Pacific Railroad Company, is concerned, and having fully answered and discharged the rule heretofore entered herein, this respondent prays that he may be hence dismissed, with costs.

B. S. BAKER,
Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the Second Judicial Distri- Court, Respondent.

R. E. TWITCHELL,
Attorney for Respondent.

12 And afterwards, on to-wit the twenty-fourth day of the said regular term of the supreme court of the Territory of New Mexico, the same being the 13th day of September, A. D., 1904, the following among other proceedings were had and entered of record to-wit:—

TERRITORY OF NEW MEXICO *ex Rel.* CALEDONIAN Coal Company, Relator, *vs.* Hon. BENJAMIN S. BAKER, Associate Justice, etc., *et als.*, Respondents.	No. 1063. Mandamus.

This cause coming on before the court upon the return of the respondents herein in answer to a rule of this court, commanding the said respondents to show cause why a peremptory writ of mandamus should not be granted herein, is argued by R. E. Twitchell Esq. for respondents and Neill B. Field, Esq. for relators, and sub-

mitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, on to-wit on the twenty-fifth day of the said regular term, of the supreme court of the Territory of New Mexico, the same being the 14th day of September, A. D., 1904, the following among other proceedings wer- had and entered of record to-wit:—

TERRITORY OF NEW MEXICO *ex Rel.* CALEDONIAN Coal Company, Relator,
vs.
Hon. BENJAMIN S. BAKER, Associate Justice, etc., *et al.*, Respondents.
} No. 1063. Mandamus.

This cause having been argued by counsel, and submitted to
13 and taken under advisement by the court upon a former day of the present term, and the court being now sufficiently advised in the premises, announces its decision denying the petition for a mandamus herein, and sustaining the answer of respondents, for reasons stated in the opinion of the court on file; it is therefore considered and adjudged by the court that the answer of respondents herein, be, and the same hereby is sustained, and that in accordance therewith the petition for a mandamus herein by relator, be and the same hereby is denied and this cause hereby is dismissed.

And now comes Neill B. Field, attorney for relator herein, and moves the court for an appeal from the judgment and decree of this court to the Supreme Court of the United States, and the court being sufficiently advised in the premises, grants the said motion; it is therefore considered and adjudged that the relator herein do have an appeal from the judgment and decree of this court, to the Supreme Court of the United States.

And afterwards, on to wit the 14th day of September, A. D., 1904, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, an opinion by the court which said opinion was and is in words and figures as follows to wit:—

14 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1904.

THE TERRITORY OF NEW MEXICO *ex Rel.* Caledonian Coal Company, Relator,
vs.
Hon. B. S. BAKER, Associate Justice, etc., *et al.*, Respondents.
} No. 1063. Mandamus.

Syllabus.

The facts as set up in the application and respondents' return to the order to show cause herein are insufficient to justify the issuance of a writ of mandamus.

Opinion by the Court.

MANN, *J.:*

On September 13th, 1904, the relator filed in this court its petition for a peremptory writ of mandamus against the respondent as judge of the second judicial district of the Territory of New Mexico, to compel respondent to assume jurisdiction in a cause brought by relator in the district court of the second judicial district, sitting for the trial of causes arising under the Constitution and laws of the United States, of the Santa Fe Pacific Railroad Company, a corporation organized by an act of Congress approved March 3rd, 1897.

The suit in the district court was brought by The Caledonian Coal Company, as plaintiff, against The Atchison Topeka & Santa Fe Railroad Company, The Colorado Fuel & Iron Company, The American Fuel Company and The Santa Fe Pacific Railroad Company, to recover damages against the several defendants under the act of Congress entitled "An act to regulate commerce" and subsequent acts amendatory thereto, and the act of February 4th, 1897, entitled "An act to protect trade and commerce against unlaw-
15 ful restraints and monopolies." Service was attempted to be made on the Santa Fe Pacific Railroad Company by serving a copy of a summons on one E. P. Ripley, the president of said company, while he was passing through the second judicial district, and upon the validity of that service as shown by the record the right of relator to the relief prayed for depends.

The record is clear that Mr. Ripley, when served by the marshal, was president of the Santa Fe Pacific R. R. Co.; it is undisputed that he was in the Territory casually as a sojourner, and in no way connected with any business of that company. It is also shown that the Santa Fe Pacific, prior to the time of the attempted service, had sold and disposed of its railway, road-bed, rights, franchises

and privileges, and owned no property whatever, except some lands acquired by foreclosure proceedings, within the Territory; that its board of directors held its meetings in the city of New York; that its president has his office in the city of Chicago; and that its land commissioner has his office in the city of Topeka, Kansas.

By this act of Congress of July 27th, 1866, the Atlantic & Pacific Railroad Company was authorized to build and operate a line of railroad from the States of Arkansas & Missouri to the Pacific coast, and was granted certain lands by way of a bonous for the construction of said railway. On March 3rd, 1897, Congress passed an act entitled "An act to define the rights of purchasers under mortgage authorized by an act of Congress approved April twentieth, eighteen hundred and seventy one, concerning the Atlantic & Pacific Railroad Company," and under this act the Santa Fe Pacific Company became the purchaser at the foreclosure sale and was organized as the successor of the Atlantic & Pacific Railroad Company and became the owner of the railroad and lands of said company.

By act of Congress of June 27th, 1902, the Santa Fe Pacific Railroad Company was authorized to sell or lease its railroad and franchises to the Atchison, Topeka and Santa Fe Ry. Co., a
16 Kansas corporation, and the pleadings herein show that prior to the date of the attempted service on Mr. Ripley, as president of the Santa Fe Pacific R. R. Co., the Atchison had purchased the railway, rights and franchises of the Santa Fe Pacific Company, and that the latter company was not engaged in operating any railroad in New Mexico at the time of the attempted service. The only business it is alleged that the Santa Fe Pacific Company was doing in New Mexico is that it owned lands therein and was maintaining suits in the district court of the second judicial district in connection therewith.

The act of July 2nd, 1890, under which the suit was brought by relator in the district court provides that "Any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this act may sue therefore in any circuit court of the United States in the district in which the defendant *resides or is found*" etc.

Under the facts stated, was the Santa Fe Pacific Railroad Company found in the second judicial district of New Mexico? If so, the respondent should have assumed jurisdiction of the cause against the Santa Fe Pacific Railroad Company, otherwise he properly refused to do so and the writ should be denied.

The word "found" as used in sec. 739 Revised Statute*d*, with reference to service of process in U. S. courts, is thus construed in the case of Good Hope Co. *vs.* Railway Barb. Co., 22 Federal Rep. 635.

"A foreign corporation is not 'found' within a district within the meaning of sec. 739 of the Revised Statutes for the service of process when its president comes temporarily into such district upon the business of the corporation, such corporation having no office or

place of business therein, and not having transacted any business therein, except that which the president came to settle."

17 See also: Frick *vs.* Norfolk & O. V. Rd. Co., 86 Fed. 729; U. S. *vs.* Am. Bell Tel. Co., 20 Fed. 34; R. R. Co. *vs.* Koontz, 104 U. S., 5; St. Clair *vs.* Cox, 106 U. S., 350; Canada & So. Ry. Co. *vs.* Gephart, 109 U. S., 527; Hat Sweat Band Co. *vs.* Davis Sew. Mach. Co., 31 Fed. 294; 6th Thompson on Corporations, secs. 7484-7489.

Relator contends that the above rule has no application here, for the reason that the Santa Fe Pacific Railroad Company was incorporated under an act of Congress and is therefore not a foreign corporation.

In the case of U. S. *vs.* Southern Pacific Railroad Company, 49 Federal, 297, Mr. Justice Harlan places a corporation of another State and those chartered by acts of Congress on the same footing, as to service of process. In that case he says:

"While under the acts respecting the jurisdiction of the Federal courts a corporation is a 'citizen' only of the State under whose laws it was organized, yet with respect to the district in which it may be sued, under the act of Congress of March 3, 1887, a railroad or telegraph company chartered *either by a State or by United States* is an inhabitant of any State in which it operates its lines and maintains officers for the transaction of its business" and although this case was overruled by the Supreme Court of the United States as too liberal a construction of the word 'inhabitant,' yet we think it is a fair interpretation of the word 'found' as used in the "Anti-trust act," and further believe that it is correct in making no distinction between corporation*g* of another State and those organized under an act of Congress.

The undisputed facts in this case show that the Santa Fe Pacific Railroad Company was not operating any railroad and maintained no officers for the transaction of its business within the Territory at the time the service was attempted. Congress had granted it the right to sell to the Atchison, Topeka & Santa Fe, its railroad,

18 right of way, rights and franchises, which it had done and thus ceased to do business in New Mexico. The service of the summons on Mr. Ripley while merely passing through the Territory was therefore no service on the Santa Fe Pacific Railroad Company, and the respondent properly quashed the service.

For the reasons above given the writ is denied.

EDWARD A. MANN,
Associate Justice.

We concur:

WILLIAM J. MILLS, *C. J.*
JOHN R. McFIE, *A. J.*
FRANK W. PARKER, *A. J.*
WILLIAM H. POPE, *A. J.*

TERRITORY OF NEW MEXICO, *Supreme Court,* } *ss:*

I, the undersigned, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing 18 pages and 13 lines, is a true, full and correct transcript of the record, pleadings and opinion in this court in a certain cause entitled Territory *ex rel.* Caledonian Coal Company relator *vs.* Hon. Benjamin S. Baker associate justice etc. *et al.* respondents and numbered 1063, as the same appears on file in my office and of record in the record of proceedings of this court.

Seal Supreme Court, Territory of New Mexico.

Witness my hand and the seal of the supreme court of the Territory of New Mexico this the 26th day of September, 1904.

JOSÉ D. SENA, *Clerk.*

19 In the Supreme Court of the United States.

TERRITORY OF NEW MEXICO *ex Rel.* CALEDONIAN COAL COMpany, Appellant,

vs.

BENJAMIN S. BAKER, Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the Second Judicial District Court Thereof, and The Second Judicial District Court of the Territory of New Mexico, Appellee-.

Assignment of Errors.

Comes now the said appellant, and shows to the court here that in the record, proceedings and judgment of the supreme court of the Territory of New Mexico in the above-entitled cause, there is manifest error, in this, to-wit:—

I.

The court erred in sustaining the sufficiency of the answer of the appellee herein.

II.

The court erred in denying the application of appellant for a mandamus as prayed for.

III.

The court erred in dismissing said cause.

Wherefore appellant prays that the judgment of the supreme court of New Mexico may be reversed, vacated and set aside, and

this cause remanded with directions to grant unto appellant a peremptory writ of mandamus as prayed for.

NEILL B. FIELD,
Attorney for Appellant.

20 [Endorsed:] In the Supreme Court of the United States. Territory of New Mexico, *ex rel.* Caledonian Coal Company, appellant, *vs.* Benjamin S. Baker, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof, and the Second Judicial District Court of the Territory of New Mexico, appellee-. Assignment of errors. Neill B. Field, attorney for appellant.

Endorsed on cover: File No. 19,519. New Mexico Territory supreme court. Term No. 419. The Territory of New Mexico *ex rel.* Caledonian Coal Company, appellant, *vs.* Benjamin S. Baker, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof, &c. Filed November 8th, 1904. File No. 19,519.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 419.

THE TERRITORY OF NEW MEXICO EX REL. CALEDONIAN COAL COMPANY, APPELLANT,

vs.

BENJAMIN S. BAKER, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO AND JUDGE OF THE SECOND JUDICIAL DISTRICT COURT THEREOF, AND SAID SECOND JUDICIAL DISTRICT COURT, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

MOTION TO ADVANCE.

NEILL B. FIELD,
Counsel for Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 13899

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

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THE TERRITORY OF NEW MEXICO ex REL. CALEDONIAN COAL COMPANY, APPELLANT.

vs.

BENJAMIN S. BAKER, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO AND JUDGE OF THE SECOND JUDICIAL DISTRICT COURT THEREOF, AND SAID SECOND JUDICIAL DISTRICT COURT, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

MOTION TO ADVANCE.

Counsel for appellant submits a motion to advance this cause for hearing during the present term and at as early a day as the convenience of the court will permit.

No appearance has been entered in this court in behalf of appellees, but counsel who appeared in the court below has been duly notified of this motion.

STATEMENT.

The Caledonian Coal Company commenced in February, 1904, in the district court of the second judicial district of the Territory of New Mexico, sitting for the trial of causes arising under the Constitution and laws of the United States, an action at law for the recovery of damages for alleged violations of the provisions of the legislation of Congress commonly known as the interstate commerce law and the Sherman anti-trust law, against several corporations, including the Santa Fe Pacific Railroad Company, a corporation organized under the provisions of an act of Congress, and process therein was served on the president of said corporation. On the return day of the writ, the corporation, by its counsel, entered a special appearance and moved to quash the service upon the ground that the corporation was not "an inhabitant of" nor "found" within the said district, within the meaning of the acts under which the suit was brought, and the service was therefore invalid and conferred no jurisdiction of the person of the corporation upon the court. The court sustained the motion and quashed the service. Appellant thereupon applied to the supreme court of New Mexico for leave to file, and, upon leave granted, filed an application for a writ of mandamus to compel the court to take jurisdiction of the person of the said corporation and proceed to the adjudication of the cause. An answer was filed and a hearing had upon the pleadings and judgment was entered in favor of the appellees, and an appeal was in open court taken to this court. The result of this judgment is to prevent further proceed-

ings in the original cause for the reason that the cause cannot properly proceed to trial upon its merits until the Santa Fe Pacific Railroad Company is before the court, and the ruling precludes the possibility of effecting service of process on that company.

The appellant, being thus denied the remedy specifically provided by Congress for the redress of the wrongs complained of until this cause is disposed of by this court, respectfully asks that this cause, which is clearly a proceeding in aid of the appellate power of this court in the original cause, may be advanced under the rules and practice of this court.

NEILL B. FIELD,
Counsel for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1904.

THE TERRITORY OF NEW MEXICO *ex Rel.* CALEDONIAN COAL COMPANY, *Appellant*,
vs.
BENJAMIN S. BAKER, *Associate Justice, etc., Appellees.*
No. 419.

Neill B. Field, being first duly sworn, on his oath deposes and says that more than thirty days prior to the 12th day of December, 1904, he caused to be mailed to R. E. Twitchell, counsel for appellees in the court below, a notice of the application to advance the above-entitled cause and was afterwards told by Mr. Twitchell that the notice had been duly received.

NEILL B. FIELD.

Subscribed and sworn to before me by Neill B. Field this 1st day of December, 1904.

[SEAL.] JAMES D. MAHER,
Notary Public, District of Columbia.

[Endorsed:] File No. 19,519. Supreme Court U. S., October term, 1904. Term No. 419. The Territory of New Mexico *ex rel.* Caledonian Coal Co., app't, *vs.* Benjamin S. Baker, associate justice, &c. Motion to advance. Filed Dec'r 1, 1904.

Supreme Court of the United States

OCTOBER TERM, 1904

No. 419

THE TERRITORY OF NEW MEXICO, *EX REL.* CALEDONIAN COAL COMPANY, APPELLANT.

vs.

BENJAMIN S. BAKER, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO AND JUDGE OF THE SECOND JUDICIAL DISTRICT COURT, AND SAID SECOND JUDICIAL DISTRICT COURT, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF FOR APPELLANT.

STATEMENT.

In February, 1904, the Caledonian Coal Company, a corporation organized under the laws of the Territory of New Mexico, commenced, in the district court of

the second judicial district of the Territory of New Mexico, sitting for the trial of causes arising under the constitution and laws of the United States, an action at law for the recovery of damages against the Santa Fe Pacific Railroad Company, a corporation created under an act of congress (29 *Stat.* 622), and other corporations, for the recovery of damages for alleged violations of the provisions of the legislation of congress commonly known as the interstate comerce law and the Sherman anti-trust law. The action was brought under the authority of section 7 of an act entitled, "An act to protect trade and commerce against unlawful restraints and monopolies" (26 *Stat.* 209), as follows:

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

And the provisions of section 9 of the act entitled, "An act to regulate commerce" (24 *Stat* 379), as follows:

> "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both

of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

* * * *

Service of process was made by the United States marshal for the District of New Mexico upon E. P. Ripley, president of the Santa Fe Pacific Railroad Company, within the second judicial district of the Territory of New Mexico, by delivering to him a copy of the summons in the case, with a copy of the complaint thereto attached.

At the return day of the writ, the Santa Fe Pacific Railroad Company, appearing specially for that purpose, filed a motion to quash the service, for various reasons, which in legal effect amounted to the contention:

First. That the Santa Fe Pacific Railroad Company is not an inhabitant of the Territory of New Mexico; and,

Second. That it was not "found" within the Territory, within the meaning of the statutes upon which the jurisdiction of the trial court depends.

This motion was supported by the affidavit of Mr. Ripley, setting up, in effect, that, at the time of the service of the summons, he was passing through the Territory of New Mexico, as a traveler, not engaged in the discharge of his duties as president of the Santa Fe Pacific Railroad Company, nor transacting business for that company; that, as president of the company, he had his office in the city of Chicago, in the state of Illinois; and that the meeting place of the board of directors of the company was at the city of New York in the

state of New York; while the land agent of the company had his office at the city of Topeka, in the state of Kansas. It was further made to appear, in support of the motion, that the Santa Fe Pacific Railroad Company had, prior to the date of the service of the summons, under the authority of an act of congress (32 *Stat.* 405), sold and conveyed, to the Atchison, Topeka and Santa Fe Railway Company, its railway and its rights and franchises appertaining thereto, and that the Santa Fe Pacific Railroad Company was not, at the time of the service, engaged in operating a railroad within New Mexico. It was not shown that, at the time of the service of process, the Santa Fe Pacific Railroad Company was the owner of any property in Kansas, Illinois or New York, or of any other property, except the lands to which reference will be hereafter made.

In opposition to the motion, it was shown:

That the Santa Fe Pacific Railroad Company was created under an act of congress entitled, "An act to define the rights of purchasers under mortgages authorized by an act of congress approved April twentieth, eighteen hundred and seventy-one, concerning the Atlantic and Pacific Railroad Company," approved March 3rd, 1897, (29 *Stat.* 622.)

That the Atlantic and Pacific Railroad Company was incorporated under an act of congress entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866 (14 *Stat.* 292.)

That the Atlantic and Pacific Railroad Company was authorized, by an act of congress, to mortgage its lands and franchises to aid in the construction of its road by

the provisions of an act entitled, "An act to enable the Atlantic and Pacific Railroad Company to mortgage its road," approved April 20th, 1871 (*17 Stat.* 19.)

That such mortgage had been executed and foreclosed, and that the Santa Fe Pacific Railroad Company became the owner of the said lands and franchises by reason of the foreclosure proceedings, and the said act of congress, and was, at the time of the service, and still is the owner of several hundred thousand acres of said lands situate within the second judicial district aforesaid and was maintaining and prosecuting suits in the district court of Bernalillo county, New Mexico, within said district, respecting its title and right to possession of portions of said lands.

The district court sustained the motion and quashed the service of process, whereupon appellant applied to the supreme court of New Mexico for leave to file, and, upon leave granted, filed the information in this case, and prayed a writ of mandamus to be directed to the judge of said court, and to the said court, commanding and requiring the said court to assume jurisdiction of the said cause, and to proceed therein as right and justice might require.

An answer was filed, and the case was heard in the supreme court upon the information and the answer, and was decided upon the pleadings, no evidence being taken, and the supreme court, for the reasons set forth in its opinion, denied the application for the writ, whereupon an appeal was prayed to this court, and the appellant has assigned the following grounds of error:

I.

The court erred in sustaining the sufficiency of the answer of the appellee herein.

II.

The court erred in denying the application of appellent for a mandamus as prayed for.

III.

The court erred in dismissing said cause.

POINTS AND AUTHORITIES.

I.

THE DISTRICT COURT HAD JURISDICTION OF THE SUBJECT MATTER OF THE ORIGINAL ACTION.

Counsel for appellant does not know whether or not this proposition is controverted, but suggests that it is scarcely a debatable one.

By section 17 of the organic act of New Mexico, it is provided:

> "That the constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within said Territory of New Mexico as elsewhere within the United States." (9 *Stat.* 452).

And by another section of the same act, now compiled as section 1910 of the Revised Statutes of the United States, it is provided:

> "Each of the district courts in the territories mentioned in the preceding section shall have and exercise the same jurisdiction, in all cases arising under the constitution and laws of the United States, as is vested in the circuit and district courts of the United States; and the first six days of every term of the respective district courts, or so much thereof as is necessary shall be appropriated to the trial of causes arising under such Constitution and laws; but writs of error and appeals

in all such cases may be had to the supreme court of each territory, as in other cases." (*R. S. U. S. sec.* 1910).

Now, while it is true, that the court in which the original action was brought, is not, *eo nomine*, a circuit or district court of the United States, it is inconceivable that any court could conclude that it was the intenion of congress to withhold from such courts jurisdiction to administer the remedy sought to be enforced by appellant; to so hold, would be to defeat the purpose of congress in enacting the legislation relied on, so far as the people of the territories are concerned, notwithstanding the express intention of congress to include the people of the territories within the protection of that legislation For instance, it is provided, by section 3 of the Sherman act, as follows:

"Every contract, combination in form of trust or otherwise, or conspiracy, inrestraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is hereby declared illegal." (*26 Stat.* 209.

* * * *

The act to regulate commerce, in its first section, provides:

"That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both areu sed, under a common con-

trol, management, or arrangement, for a continuous carriage or shipment, from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia." (24 *Stat.* 379.

* * * *

If the district courts of the territories, when sitting for the trial of causes arising under the Constitution and laws of the United States, are not invested with jurisdiction to administer the remedy here invoked, then persons and corporations violating these statutes, and confining their operations to the territories need not respond in damages, however flagrant their violations of the law.

They cannot be sued, in the United States circuit or district courts, because the jurisdiction of those courts does not extend to the territories; and if they cannot be sued in the territorial courts, they cannot be sued at all.

I have found no reported case where this precise question has been adjudicated, but this court has, several times, held that the district courts of the territories are, by the provisions of the section quoted, invested with admiralty jurisdiction.

> "Beyond all question admiralty jurisdiction, including jurisdiction in prize cases, was vested in the territorial district courts by the ninth section of the organic act, the explicit language of the act being that the district courts of the territory shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States, and also of all cases arising under the laws of the territory.
>
> "Earnest effort is made in argument to show

that inasmuch as a case in admiralty does not strictly arise under the Constitution and laws of the United States, that the clause of the organic act referred to does not vest jurisdiction to hear and determine such cases in the territorial district courts, for which proposition they refer to one of the decisions of this court. *The American Insurance Co. vs. Canter,* 1 *Pet.* 511, 546.

"Select passages of the opinion in that case, when detached from the context, may appear to support the theory of the respondents, but the actual decision of the court is explicitly and undeniably the other way."

The "City of Panama," 101 *U. S.* 458.

This proposition was first announced in a very early case, *Insurance Company vs. Canter,* 1 Pet. 511, and has been several times reaffirmed by this court.

By section 2 of an act of congress entitled, "An act to provide for the bringing of suits against the government of the United States," approved March 3d, 1887, (24 *Stat.* 505), it is provided:

"That the district courts of the United States shall have concurrent jurisdiction with the court of claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All cases brought and tried under the provisions of this act shall be tried by the court without a jury."

It has been held by the supreme court of Oklahoma, and by the supreme court of Utah, that the section last quoted, invested the district courts ofthoseterritories with a like jurisdiction; and in the Utah case, an appeal was taken to this court on behalf of the United

States, but was here dismissed by consent of the attorney general.

9 *Stat.* 542.
R. S. U. S. sec. 1910.
24 *Stat.* 379.
26 *Stat.* 209.
The "City of Panama," 101 *U. S.* 458.
Insurance Company vs. Canter, 1 *Pet.* 511.
In re Cooper, 143 *U. S.* 494.
24 *Stat.* 505.
U. S. vs. Foreman, 5 *Okla.* 237.
Johnson vs. U. S., 6 *Utah,* 403.
U. S. vs. Johnson, 140 *U. S.* 703.

II.

THE SANTA FE PACIFIC RAILROAD COMPANY IS NOT A "FOREIGN" CORPORATION IN NEW MEXICO.

The fundamental error of the supreme court of the Territory of New Mexico, as disclosed by its opinion, lies in the assumption by that court that the Santa Fe Pacific Railroad Company is a "foreign" corporation in New Mexico. The assumption is supported by no reasoning, but that the court did so assume appears from the following statements contained in the opinion:

> "The record is clear that Mr. Ripley, when served by the marshal, was president of the Santa Fe Pacific Railroad Company. It is undisputed that he was in the territory casually as a sojourner, and in no way connected with any business of that company. It is also shown that the Santa Fe Pacific, prior to the time of the attempted service, had sold and disposed of its railway, roadbed, rights, franchises and privileges, and owned no property whatever, except some lands acquired by

foreclosure proceedings, within the territory; that its board of directors held its meetings in the city of New York; that its president has his office in the city of Chicago; and that its land commissioner has his office in the city of Topeka, Kan." (*Trans. p.* 11).

It is also said in the opinion:

"By act of congress of June 27, 1902, (32 *Stat.* 405, *c.* 1159), the Santa Fe Pacific Railroad Company was authorized to sell or lease its railroad and franchises to the Atchison, Topeka & Santa Fe Railway Company, a Kansas corporation, and the pleadings herein show that prior to the date of the attempted service on Mr. Ripley, as president of the Santa Fe Pacific Railroad Company, the Atchison had purchased the railway,, rights and franchises of the Santa Fe Pacific Company, and that the latter company was not engaged in operating any railroad in New Mexico at the time of the attempted service. The only business it is alleged that the Santa Fe Pacific Company was doing in New Mexico is that it owned lands therein, and was maintaining suits in the district court of the second judicial district in connection therewith." (*Trans. p.* 12).

If these facts warrant the assumption that the Santa Fe Pacific Railroad Company is a foreign corporation in New Mexico, it must follow that it is foregn to every other jurisdiction in the United States, and that it is not a domestic corporation anywhere within the jurisdiction of congress. It cannot be said to be a domestic corporation of the state of Illinois, because its president has his office in that state; nor of the state of New York, because its board of directors is accustomed to meet in that state; nor of the state of Kansas, because its land agent has his office in that state.

It must, indeed, be held to be a corporation without a

domicile, and authorized to change its habitat as the exigencies of any particular lawsuit may require. It now operates no line of railway anywhere. It owns, so far as this record shows, no property of any kind outside of the district in which it was sued. Such powers as still pertain to it must, of necessity, relate to its ownership of lands within the district in which service was made on its president, and those lands are held by it as the successor of the Atlantic and Pacific Railroad Company, which company, by the act incorporating it, "shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States." (14 *Stat.* 293).

By the act incorporating it, it was provided that, when incorporated, it

> "shall have and shall be entitled to hold and possess the franchises and property so sold, and to exercise the same rights, powers, privileges, grants and franchises, including the franchise to be a corporation, granted by the act of congress approved July twenty-seventh, eighteen hundred and sixty-six, incorporating the Atlantic and Pacific Railroad Company, and by acts amendatory thereof and supplemental thereto, which were owned and possessed by said Atlantic and Pacific Railroad Company, or said mortgagees at the time of such decree of foreclosure" * * * * (29 *Stat.* 622-623)

The same act provided:

> "Where the line of such railway is now located within the limits of any state, or where such line is now located within a territory which may hereafter become a state, such state or such territory, when it shall become a state, shall be empowered to require such corporation to become incorporated within such state or states as may be provided by the laws thereof." (*Ibid.* 624).

When the Santa Fe Pacific Railroad Company was authorized by congress to sell or lease its lines to the Atchison, Topeka and Santa Fe Railway Company (32 *Stat.* 405), it was not thereby authorized to remove itself beyond the jurisdiction of the courts of New Mexico; it was not authorized to sell, and did not sell, its franchise to be a corporation; and it seems quite clear that when, if ever, New Mexico shall be admitted as a state, the state may require it to become incorporated under its laws, and may thereafter treat it as a corporation of the state. If it was a domestic corporation in New Mexico, as it clearly was, before it sold its railway line, etc., it did not, by reason of such sale, cease to be a domestic corporation within that territory. It wisposed of a part of its property and franchises, but that portion of its property and franchises not disposed of was not affected by the transfer. Congress did not authorize any change of relation between the corporation and the territory, and no change was effected by operation of law because of the exercise of the authority granted. Congress designated no domicile, or principal place of business, for either the Atlantic and Pacific Railroad Company, or the Santa Fe Pacific Railroad Company, nor does it appear that the board of directors of either corporation ever designated, if it had power so to designate, a principal place of business, or dimicile, for either corporation.

Obviously, a corporation created by or under authority of an act of congress has its domicile in every place where it may lawfully exercise its corporate powers.

> "It is very true, that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in con-

templation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

Bank of Augusta vs. Earle, 13 *Pet.* 588.

"A corporation created by congress directly, in pursuance of its powers of local legislation over a territory, or immediately through a territorial legislature, is *prima facie* a corporation of the territory, as a corporation created by a state of the Union is a corporation of the state."

1 *Thomp. Corp. Sec.* 681.

"It is well settled that scongress has power under the Constitution to charter corporations, in order to accomplish any of the authorized purposes of the federal government; and it is equally clear that the right of corporations, chartered by congress for federal purposes, to exercise their franchises throughout the United States, rests wholly upon the powers conferred by the Constitution upon congress, and not upon the mere comity of the several states. Corporations chartered by the congress of the United States are, therefore, usually to be regarded as 'domestic,' and not as 'foreign' corporations, in every state and territory of the Union."

2 *Morawetz Corp. sec.* 984.

"The general government, in its relation to that of the several states, cannot be considered a foreign government in the ordinary acceptation of that term. Within the sphere of its delegated powers its authority extends over all the states of which it is composed, and to that extent it may be said to be identified with the government of each. Hence a corporation created by the government of the United States cannot with propriety be called a foreign corporation."

Com vs. Tex. & P. R. R. Co., 98 *Pa. St.* 100.

"Of course the authority of congress over the

territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been undoubted."

California vs. Pac. R. R. Co., 127 *U. S.* 39.

The Santa Fe Pacific Railroad Company holds its lands in New Mexico under the authority of congress, and that authority is clearly not subject to be circumscribed by territorial legislation. The franchise to exist as a corporation is on the same footing.

14 *Stat.* 293.
29 *Stat.* 622-623, 624.
32 *Stat.* 405.
Bank of Augusta vs. Earle, 13 *Pet.* 588.
1 *Thomp. Corp. secs.* 675, 681.
2 *Morawetz Corp. sec.* 984.
Com. vs. Tex. & Pac. R. R. Co., 127 *U. S.* 39.
Van Dresser vs. Oregon Ry. & Nav. Co., 48. *Fed.* 202.
Pac. R. R. Removal Cases, 115 *U. S.* 1.
Bank of U. S. vs. Roberts, 2 *Fed. Cas. p.* 728.

III.

THE SANTA FE PACIFIC RAILROAD COMPANY WAS "FOUND" WITHIN THE DISTRICT IN WHICH THE SUIT WAS BROUGHT.

It appears from an inspection of the opinion of the court below that that court treated the Santa Fe Pacific Railroad Company as being on the same footing with a corporation chartered by a state; for this proposition the case of *United States vs. Southern Pacific Railroad Company*, 49 *Fed.* 297, *is cited.* (*Trans. p.* 13).

The quotation found in the opinion is from the syl-

labus of the case as reported, but there is nothing in the language of Mr. Justice Harlan which indicates that he entertained any such view. The opinion does not discuss the significance of the word "found," but is confined entirely to a discussion of the word "inhabitant" as applied to corporations, and the citation of it by the court below is fortunate for appellant because the case, as far as it goes, supports our contention.

It is needless to cite or discuss the great number of cases in which this and other courts have held that a foreign corporation cannot be subjected to the jurisdiction of a court, federal or state, by service of process upon one of its officers or agents casually within its territorial jurisdiction, but which owns no property, and does no business in the jurisdiction where the service is made. The proposition is freely conceded, but its application to the case at bar is denied. Nor need we discuss the statutes of New Mexico which confer authority upon foreign corporations to do business within the territory, or which prescribe how service of process may be made upon such corporations. The statutes of the territory which prescribe how service may be made upon domestic corporations are, however, relevant. They are as follows:

> "In suits against any corporation, summons shall be served in that county where the principal office of the corporation is kept or its principal business carried on, by delivering a copy to the president thereof, if he may be found in said county, but if he is absent therefrom, then the summons shall be served in like manner in the county on either the vice president, secretary, treasurer, cashier, general agent, general superintendent or stockholder, or any agent of said corporation, within such time and under such rules as are provided

by law for the service of such process in suits against real persons, and if no such person can be found in the county where the principal office of the corporation is kept, or in the county where its principal business is carried on, to serve such process upon, a summons may issue from either one of such counties, directed to the sheriff of any county in this territory where any such person may be found and served with process If such corporation keeps no principal office in any county, and there is no county in which the principal business of such corporation is carried on, then suit may be brought against it in any county where the above mentioned officers, or any or either of them may be found: *Provided*, That the plaintiff may, in all cases, bring his action in the county where the cause of action accrued"

C. L. N. M. 1897, *sec.* 450.

"Whenever in any suit or proceeding in any court of the territory, either in law or equity, it becomes necessary to serve any process, notice or writing upon any railroad company, foreign or domestic, *operating its road in this territory*, it shall be sufficient to serve the same upon any station agent at any station or depot along the line within any county in this territory, and when there are no such stations or agents in the county, then it may be served upon any conductor of a passenger or freight train of cars of such company."

Ibid sec. 2963.

The latter of these sections has no application, because the Santa Fe Pacific Railroad Company was not, at the time of the institution of this suit "operating its road in this territory", but service was made in strict accordance with the first section quoted, and with common law requirements.

K. C. R. R. Co. vs. Daugherty, 138 *U. S.* 298.

The contention of the railroad company must be clearly established.

It affirmatively appears from the answer that the service on the Santa Fe Pacific Railroad Company was sufficient, and that appellant is entitled to the relief prayed for.

New Haven, etc, Co. vs. Dowington Co., 130 *Fed.* 605.

U. S. vs. Southern Pac. R. Co., 49 *Fed.* 297.

C. L. N. M. 1897, *sections* 450 *and* 2963.

K. C. R. R. Co. vs. Daugherty, 138 *U. S.* 298.

New Haven, etc., Co. vs. Dowington Co., 130 *Fed.* 605.

Cosmopolitan, etc., Co. vs. Walsh, 193 *U. S.* 460.

Respectfully submitted,

NEILL B. FIELD,
Counsel for Appellant.

Supreme Court of the United States

OCTOBER TERM, 1904

No. 419

THE TERRITORY OF NEW MEXICO, *EX REL.*, CALEDONIAN COAL COMPANY, APPELLANT,

vs.

IRA A. ABBOTT (SUCCESSOR TO BENJAMIN S. BAKER), ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO AND JUDGE OF THE SECOND JUDICIAL DISTRICT COURT THEREOF, AND SAID SECOND JUDICIAL DISTRICT COURT, APPELLEES.

PETITION FOR REHEARING.

Appellant in the above entitled cause moves the court to grant a rehearing therein for the following reasons:

I.

Because this court has evidently assumed, for the purpose of this adjudication, that a Territorial district court, when exercising jurisdiction in cases arising under the Constitution and

laws of the United States, is a court of limited, and not of general jurisdiction.

II.

Because the court apparently assumes that the right of the Santa Fe Pacific Railroad Company to immunity from suits in the Federal courts outside of the district in which it is an inhabitant, without its consent, applies to it when sued in a Territorial court.

III.

Because the court apparently assumes, for the purposes of this decision, that the Santa Fe Pacific Railroad Company was, at the time of the service of process on its president, "doing business" other than in connection with its lands in New Mexico, when the contrary affirmatively appears by the record.

IV.

Because the court appears to have adopted as the basis of its decision the statement in the affidavit of President Ripley as follows: "that the company had no property in the Territory of New Mexico, except *lands acquired by it under a foreclosure of a mortgage* of the Atlantic and Pacific Railroad Company," and which lands were undisposed of, when it affirmatively appears from the record that the Santa Fe Pacific Railroad Company was incorporated for the purpose, among other things, of becoming the owner of those lands, and, at the time of the service of process, had no other business or reason for existence, except the ownership and management of those lands.

V.

The court appears to have determined this

case upon the theory that the question for consideration was whether or not President Ripley was attended by the corporation when he came into New Mexico, while the real question is, whether or not the Santa Fe Pacific Railroad Company has not, at all times, been subject to the jurisdiction of the court in which this action was brought, whenever it could be effectively notified of the pendency of a suit.

VI.

Because the court appears to hold that it was incumbent on appellant to show the existence of some local statute authorizing service of process in the manner in which service was made in this instance, while appellant insists that Territorial district courts may exercise the jurisdiction conferred on them by Congress, when sitting for the trial of causes arising under the Constitution and laws of the United States, in the absence of any Territorial legislation, although it is conceded that if there be Territorial legislation regulating the manner of the exercise of its jurisdiction, such regulation must be pursued.

VII.

Because the decision in this case appears to be in conflict with previous decisions of this court not called to the attention of the court by counsel, and to be, to some extent, due to a misapprehension by the court of the position of counsel for appellant.

NEILL B. FIELD,
Counsel for Appellant.

May it please the court. I should not, ordinarily, feel at liberty to ask this court to re-ex-

amine its unanimous conclusion, but, with much hesitation, and a sincere conviction that my duty to my client requires it, I venture to suggest that a re-examination of this record will convince the court that due weight has not been given to the controlling feature of this case.

The Santa Fe Pacific Railroad Company, at the time of the institution of this suit, had ceased to be a railroad company in anything but name. By the authority of Congress, it had sold and disposed of its railway property and franchises to the Atchison, Topeka and Santa Fe Railway Company, and the only reason for its further existence was the ownership and management of lands which, as far as is shown by this record, are wholly within the second judicial district of the Territory of New Mexico. The purposes for which it now exists are identically those for which the United States Freehold Land and Emigration Company was created a corporation by Congress by an act approved July 8th, 1870. (*16 Stat. L. 192.*) The Santa Fe Pacific Railroad Company did not acquire these lands under a foreclosure of a mortgage, in the sense that the acquisition of such lands was a mere incident of its corporate business, but, on the contrary, such acquisition and ownership was one of the reasons for its creation, and the only reason for its continued existence. It could not have acquired title to these lands without the express authority of Congress. By an act approved March 3d, 1887, entitled "An act to restrict the ownership of real estate in the Territories," etc., (*24 Stat. L. 476*), it is provided:

"Sec. 2. That no corporation or association more than twenty per centum of the stock of which is or may be owned by any person or persons, corporation or corporations, association or associations, not citizens of the United States, shall hereafter acquire or hold or own any real estate hereafter acquired in any of the Territories of the United States or of the District of Columbia.

"Sec. 3. That no corporation other than those organized for the construction or operation of railways, canals, or turnpikes shall acquire, hold or own more than five thousand acres of land in any of the Territories of the United States;

"And no railroad, canal, or turnpike corporation shall hereafter acquire, hold or own lands in any Territory, other than as may be necessary for the proper operation of its railroad, canal, or turnpike, except such lands as may have been granted to it by act of Congress.

"But the prohibition of this section shall not affect the title to any lands now lawfully held by any such corporation.

"Sec. 4. That all property acquired, held or owned in violation of the provisions of this act shall be forfeited to the United States, and it shall be the duty of the Attorney-General to enforce every such forfeiture by bill in equity or other process.

"And in any suit or proceeding that may be commenced to enforce the provisions of this act, it shall be the duty of the court to determine the very right of the matter without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights either of the United States or of the parties concerned in any such proceeding arising out of the matters in this act mentioned."

The reason for the rule which holds that corporations of one jurisdiction, buying lands in another jurisdiction, in foreclosure proceedings for the protection of their claims against debtors, do not thereby "do business" in such jurisdiction, has no application to the Santa Fe Pacific Railroad Company, and, while the justice and propriety of the rule is conceded, it is insisted that it is a perversion of the rule to apply it in this case.

Santa Clara Academy vs. Sullivan, 116 Ill. 375.

Penn. Life Co. vs. Bauerle, 143 Ill. 462.

Congress, in the exercise of its Constitutional power to create Federal agencies, created the Santa Fe Pacific Railroad Company, and authorized that company to acquire the railroad property and franchises of the Atlantic and Pacific Railroad Company, which, under foreclosure proceedings, had been sold to a committee of the bondholders of the latter corporation.

The Santa Fe Pacific Railroad Company was also authorized to acquire what remained of the lands which had been granted to the Atlantic and Pacific Railroad Company to aid in the construction of its railroad, but I apprehend that this latter authority finds its warrant in the power of Congress to legislate concerning the territory and property of the United States, rather than elsewhere in the Constitution. I doubt if it would be seriously contended that Congress has the power to create a land company, such as the United States Freehold Land and Emigration Company, to acquire lands and operate in one of the States of this Union; and

yet, the Santa Fe Pacific Railroad Company has not, since it disposed of its railroad property and franchises under the authority of Congress, differed in any essential particular from that corporation.

It is not to be denied that Congress, in the exercise of its power to legislate for the Territories, could create a land corporation such as is now under discussion, and could authorize it to hold title to lands in New Mexico, and could provide that it should not be subject to the jurisdiction of the courts of New Mexico; but it is not to be believed that Congress has intentionally done any such thing, or that this court will hold that any such condition exists, unless it is driven to do so by the imperative requirements of the law.

So long as the Santa Fe Pacific Railroad Company continued to be a Federal agency, there is little reason to doubt that it could carry on its business wherever the laws of Congress are in force, and without the consent of any other authority. Whether as a mere land company it could "do business" outside the Territories without the consent of the several States, is, to say the least, questionable. While the power of Congress to create a mere trading corporation in the Territories is clear, its want of power to authorize such a corporation to do business in one of the States of the Union, without the consent of that State, is, as it seems to me, equally clear. As I conceive it, the Santa Fe Pacific Railroad Company, at the time of its incorporation, had a dual capacity,—one quasi public in nature, in which it constituted a Federal agency, and the other purely private

and speculative. Congress granted lands to the Atlantic and Pacific Railroad Company to aid in the construction of its railroad, but when the Santa Fe Pacific Railroad Company came into being, the railroad had been constructed, and there was no longer any necessary connection between the grant of lands and the railway franchise. Congress might, if it had seen fit to do so, have created a separate corporation to take and hold these lands, but such a corporation, when created, would have been purely local in character; would have been, in no sense, a Federal agency; and subject to be excluded from doing business in any State, without the consent of that State. By the act authorizing the Santa Fe Pacific Railroad Company to sell its railroad property and franchises, it has, virtually, done this, because it has made the purchasing company a national corporation to the extent of the franchises purchased, and has divested the Santa Fe Pacific Railroad Company of its national character.

> "On the 25th of April, 1864, an act had been passed by the Legislature of New York, Laws of New York, 1864, ch. 385, p. 884, entitled 'An Act to consolidate the Boston, Hartford and Erie, the Boston, Hartford and Erie Extension, and the Boston, Hartford and Erie Ferry Extension Railroad Companies.' It provided as follows: 'The Boston, Hartford and Erie Extension Railroad Company, and the Boston, Hartford and Erie Ferry Extension Railroad Company, may both, or either, sell and convey to the Boston, Hartford and Erie Railroad Company the franchise and property of said several corporations,

upon such terms as may be mutually agreed upon.' * * * * *

"This act professes, in its title, to be an act to consolidate the three companies. It authorizes the sale to the Boston, Hartford and Erie Company of the franchises and property of the other two corporations, (which were New York corporations,) and provides that such sale shall pass the title to such franchises and property, and that the purchasing company shall thereby 'become possessed of the rights of charter and property sold,' and thereafter have, hold and use the same in its 'own name and right.'

"As a purchaser of what this act authorized to be sold to it, the company purchasing became a New York corporation, by its then existing name." * *

Graham v. Boston etc. R. R. Co., 118 U. S. 166-167.

"The Hartford, Providence & Fishkill Railroad Company was, without question, so far as it owned and operated a railroad within the State of Rhode Island, a corporation in and of that State; and the Boston Hartford and Erie Railroad Company became its legal successor in that State, as owner of its property, and exercising its franchises therein, and became, therefore, in respect to its railroad in Rhode Island, a corporation in and of that state."

Clark v. Barnard, 108 U. S. 449.

The grant of lands to the Atlantic and Pacific Railroad Company by Congress, and the authority granted to the Santa Fe Pacific Railroad Company, to take title to what remained of those lands, stand upon entirely different bases. The first was to enable the grantee to obtain

money wherewith to equip itself to perform its public functions; the latter was to enable the bondholders who had furnished the money for the construction of the Atlantic and Pacific Railroad line to manage and dispose of these lands, which were part of their security, to the best advantage.

The right, formerly possessed by the Santa Fe Pacific Railroad Company, to transact business throughout the Union, passed, with its other franchises, to the purchasing company; but its lands, and its liabilities, whether in tort, or by contract, remain to it, and the sole purpose of its further existence must be to apply its assets to the satisfaction of its liabilities. It cannot again enter the railroad business, for it is without a railroad franchise; and, at most, it can only do those things which are necessarily incident to the ownership of the lands referred to.

The purchasing company, by virtue of the purchase under authority of Congress, is subject to the jurisdiction of the court in the action in question.

That there may be reason and justice in the rule which says that the president of the purchasing company does not represent the company in those jurisdictions where he is merely a traveler, or sojourner, but where it does no business and owns no property, is conceded, although it is insisted that the rule must have its foundation in other considerations than those which apply to the president of a corporation created by a State, when attempted to be served with process within the jurisdiction of another State. Whether or not the president of a corporation which is a Federal agency, rep-

resents the corporation at any given place, can not be affected by State lines; for the exercise of Federal authority, under the Constitution, is not, in any manner, circumscribed by State lines. Just as the general government is present everywhere within the territorial limits of the United States, (*Harlan, J. in U. S. v. Southern Pacific Railroad Company, et al., 49 Fed. 301*), so a general or special law of the United States, even one in the form of a corporate charter, is present everywhere in the United States, except in cases wherein the force and effect of such law may be restricted by its express or implied terms. The grant, by Congress, of a franchise to a corporation, for the purpose of performing a public function, is in the interest of the public, not of the corporation, and should not, as I freely concede, be extended by implication to the embarrassment of the corporation in the performance of its public duties. It is probably necessary, to effectuate the purpose of Congress, that the rule should be established that such corporations are not to be embarrassed by suits, and are not to be subject to the jurisdiction of courts, in remote localities where neither the plaintiff nor the defendant resides, and where the cause of action did not accrue, and that such a limitation upon the grant of such a franchise might be fairly implied, for the reason stated; but I respectfully submit that no further limitation should be created by implication.

The long struggle in this court, which finally resulted in its existing doctrine as to the citizenship of corporations, was founded upon a divergence of views as to the principles which

should determine that citizenship, and resulted in the adoption, by the court, of a more or less arbitrary presumption that the incorporators of every corporation, created by a State, are citizens of the State of its creation. This presumption, as is well known, is contrary to the fact in many, if not a majority, of the instances in which it is invoked; but it was forced by necessity, and its wisdom is unquestionable. This presumption could, however, have no application to a corporation created by Congress, either as a Federal agency, or by virtue of its power to legislate for the Territories, for a variety of reasons, the most important of which is, that a national corporation could not invoke the jurisdiction of the Federal courts upon the ground of diversity of citizenship, because such diversity, to create the jurisdiction, must be between citizens of different States. This court has, more than once, held that the word state, as used in the clause of the Constitution to which reference is made, is there used in its narrowest sense, and embraces only the members of the American Union of States.

New Orleans v. Winter, 1 Wheat. 92.
Barney v. Baltimore, 6 Wall. 280.
Cameron v. Hodges, 127 U. S. 322.
Hooe v. Jamieson, 166 U. S. 395.

Another potent reason why the rule cannot be applied is that it is founded upon the proposition that the president of a State corporation is beyond the jurisdiction of the sovereign which created the corporation, when he goes beyond the limits of that State, for it is only when the president of a corporation departs from the

territory of its sovereign, that it can be said that he loses his official character. The corporation itself, "cannot migrate, nor change its residence, without the consent, express or implied, of its State," (*R. R. Co. v. Koontz*, 104 *U. S.* 12.) The president, in his individual capacity, may, of course, come and go as the exigencies of his business require, but in his travels, the corporation does not attend him,—he is the incident, the corporation is the principal. It is only because the corporation is fixed in the territory of its sovereign, and cannot depart, that the president, when in foreign parts, is held to be a private person, and if he be specifically authorized to represent the corporation abroad, he does it, not as president, but in the character of an agent specially constituted.

The consent of a corporation, created by one State, to be sued in another State, is implied from the doing of business outsid ethe State of its creation; but no resort to the doctrine of corporate consent, waiver or estoppel, is needed where the defendant corporation was created for the purpose of acquiring and holding lands in the district in which it is sued,—lands which it could not acquire or hold without the express authority of Congress, and in which it is summoned through its head officer. It seems that the use of the words "domestic" and "foreign," in connection with my attempt to characterize the Santa Fe Pacific Railroad Company in my brief, has led to some confusion, and to a misapprehension, on the part of the court, of my position. That I did not, by these expressions, convey to the mind of the court the idea intended, is apparent from the opinion.

The Santa Fe Pacific Railroad Company, when operating under its railroad franchise, was always more "at home" in New Mexico, then in New York, Chicago, or Topeka; but since it has been divested of its national character, it has no function to perform authorizing or requiring its presence elsewhere. The chief point of difference between a natural and artificial person is that the former may do whatever is not forbidden by law, and the latter can only do what is authorized by its charter. (*R. R. Co. v. Harris*, 12 *Wall.* 81.)

It was evidently the theory of Congress, when it authorized the incorporation of the Santa Fe Pacific Railroad Company, that the corporation to be created was to be a local corporation, for some purposes at least, and was to be subjected to the control of the State, when the Territory of New Mexico should be admitted into the Union. (*29 Stat. L. 624*).

Speaking for the court, Mr. Justice Harlan says that "the Santa Fe Pacific Railroad Company, when sued in the Territorial district court, was not an inhabitant of the district within the meaning of the local statute. It had no principal or other office in the Territory, nor did it have an officer who could, in a legal sense, be found there, nor did it, in any just sense, carry on business in the Territory. The company still owned lands there, and that fact was not sufficient, by itself, to bring the case within the provisions of the Territorial statute."

But I did not, and do not contend, that the local statute referred to extended to corporations such as the Santa Fe Pacific Railroad Company. The statute was quoted for the purpose of call-

ing sharply to the attention of the court the fact that provision by local law was made for the service of process upon corporations created by, or under the laws of the Territory, and there was no provision, by local law, for the service of process upon such a corporation as the Santa Fe Pacific Railroad Company. I do not believe a corporation created by authority of the Territory of New Mexico could evade the jurisdiction of its courts by failing to keep an office, or to do business, within the Territory, nor do I think this court would hold that such a corporation, if so situated, would not be well served with process, by delivery of the same to its president, anywhere within the limits of the Territory, and entirely without regard to the nature of the business which might have brought such president into the Territory. The contention was that the service upon Mr. Ripley would have been good service under the local law, if his corporation had been created by that law; but the further contention was made, and to that contention I invite the careful consideration of the court, that the service was good on common law principles. The Territorial district court was, by the Organic Act, invested with common law jurisdiction. It is inconceivable that the Territorial legislature could defeat the exercise of that jurisdiction, in cases arising under the Constitution and laws of the United States, by failing to provide a method for the service of process in such cases. It is true that this court has held that the jurisdiction, thus conferred, is not regulated by the judiciary acts of Congress, (*Clinton v. Englebrecht, 13 Wall. 434*), but this court has never

intimated, prior to the decision in this case, that the exercise of that jurisdiction was dependent upon local legislation. I insist that those courts can enforce rights, and administer remedies, arising under the Constitution and laws of the United States, in the absence of Territorial legislation, and may acquire jurisdiction, in common law cases, by any method which would have been sufficient to invest a common law court with jurisdiction of the person of the defendant in any case. A Territorial legislature could no more defeat the enforcement of the laws of Congress, either by action or inaction, than could the legislature of a State defeat the exercise of jurisdiction by the Constitutional Federal courts, in the same manner.

> "If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. * * * * * * *
>
> No trace is to be found in the constitution, of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplish-

ment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution."

Per Marshall, C. J., in McCulloch v. Maryland, 4 Wheat. 404, 424.

I concede that these courts are not courts of the United States, within the meaning of the Constitution; but I insist that, when sitting for the trial of causes arising under the Constitution and laws of the United States, they are no more subject to have their jurisdiction curtailed, by Territorial legislation, than are the Constitutional Federal courts subject to be defeated or circumscribed, in their jurisdiction, by State legislation. This court has said:

"the jurisdiction of the Territorial courts is collectively coextensive with and correspondent to that of the State courts—a very different jurisdiction from that exercised by the Circuit and District Courts of the United States. In fine, the Territorial, like the State courts, are invested with plenary municipal jurisdiction."

Hornbuckle v. Toombs, 18 Wall. 656.

"The district court has two distinct jurisdictions. As a Territorial court it administers the local law of the Territorial government; as invested by act of Congress with jurisdiction to administer the laws of the United States, it has all the authority

> of circuit and district courts; so that, in the former character, it may try a prisoner for murder committed in the Territory proper, under the local law, which requires the jury to determine whether the punishment shall be death or imprisonment for life, Laws of Dakota, 1833, ch. 9; and, in the other character, try another for a murder committed within the Indian reservation, under a law of the United States, which imposes, in case of conviction, the penalty of death."

Ex parte Crow Dog, 109 U. S. 560.

It is true that Congress has delegated to the Territorial legislature power to regulate the exercise of this jurisdiction; but the power to regulate does not embrace the power to destroy, and it is a familiar requirement that all Territorial legislation must be consistent with the legislation of Congress. Notwithstanding this court, in discussing this jurisdiction, in *Hornbuckle v. Toombs, supra*, said:—

> "It is true that the District Courts of the Territory are, by the organic act, invested with the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States; and a portion of each term is directed to be appropriated to the trial of causes arising under the said Constitution and laws. Whether, when acting in this capacity, the said courts are to be governed by any of the regulations affecting the Circuit and District Courts of the United States, is not now the question. A large class of cases within the jurisdiction of the latter courts would not, under this clause, come in the Territorial courts; namely, those in which the jurisdiction depends on the citizenship

> of the parties. Cases arising under the Constitution and laws of the United States would be composed mostly of revenue, admiralty, patent, and bankruptcy cases, prosecutions for crimes against the United States, and prosecutions and suits for infractions of the laws relating to civil rights under the fourteenth and fifteenth amendments. To avoid question and controversy as to the modes of proceeding in such cases, where not already settled by law, perhaps additional legislation would be desirable."

Congress has found it unnecessary to legislate further with reference to the exercise of this jurisdiction, but this court has, in numerous cases, announced principles from which the rule for which I contend is readily deducible.

Thiede v. Utah, 159 *U. S. 510.*
Reynolds v. U. S. 98 U. S. 145.
Miles v. U. S., 103 U. S. 304.
Good v. Martin, 95 U. S. 90.
Ferris v. Higley, 20 Wall. 375.

If the Territorial courts had jurisdiction of the subject matter of the original action, and I respectfully submit that this question is squarely presented by this record, and ought to be decided, to the end that my client may be spared the enormous expense of a litigation of that character, in a court whose jurisdiction is doubtful; and if that jurisdiction, as I think I have shown, may be exercised, in the absence of Territorial legislation, according to the principles of the common law, it must follow that the service of process upon Mr. Ripley, within the district, was sufficient to invest the court

with jurisdiction of the corporation. Without discussing the process of *distringas*, which, so far as my investigation enables me to speak, has never been used in the United States, the only method known to the common law, whereby a corporation could be affected with notice of the pendency of an action, was by *service* of process on the head or principal officer of the corporation *within the jurisdiction* of the sovereignty creating the corporation.

In the case of *Young v. Town of Dexter, etc., 18 Fed. 208*, Judge Dyer states the rule in the following language:

> "At common law, the process against a corporation could only be served on its head or principal officer within the jurisdiction of the sovereignty where the artificial body existed."

He cites in support of this rudimentary proposition *2 Bac. Abr. 12; Matter of McQueen v. Middletown Manuf'g Co., 16 Johns. 6; Bushel v. Ins. Co. 15 Serg. & R. 176.*

I am aware that this court, in the case of *Goldey v. The Morning News, 156 U. S. 520*, has distinctly declined to accept the doctrine of the courts of the State of New York, with relation to the power of the courts of one State to acquire jurisdiction over a corporation of another State, by service of process upon one of its officers temporarily present in the State seeking to acquire jurisdiction, but its dissent from the New York doctrine in that particular does not imply a refusal to accept the contention I make, for Chief Justice Fuller, speaking for the court in *Railroad Company v. Daughtry, 138 U. S. 305-6*, said:

> "At common law, service was made on such head officer of a corporation as secured knowledge of the process to the corporation." * *

and I am not aware that this court has ever declined to give its assent to the proposition as stated by Judge Dyer, unless it has done so in the present case. The opinion, in this case, seems to me to recognize the soundness of the principle, but to deny its application. In the opinion, it is said:

> "It is firmly established that a court of justice cannot acquire jurisdiction over the person of a defendant, except by actual service of notice upon him, within the jurisdiction, or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service."

This statement of the rule seems to be in entire harmony with that contended for, and is fully met, in all of its requirements, when the court issuing the process, the corporation, and its president are all within the jurisdiction of the sovereignty which created the corporation; but if there be a further limitation of the authority of the president to accept service in behalf of his corporation, such as I have hereinbefore indicated, I cannot believe that the limitation should be so extended as to render it impossible to obtain jurisdiction of the Santa Fe Pacific Railroad Company in the principal case, nor do I believe it to be justified, or required, by any expression to be found in any case heretofore decided by this court. In the principal case Congress created the right; provided the remedy; created the court, and invested it

with jurisdiction to administer the remedy; created the Santa Fe Pacific Railroad Company, and clothed it with authority to acquire and hold lands, which, without the authority of Congress it could not acquire or hold; and by its creature, the Territorial legislature, created the Caledonian Coal Company. Whatever may be said as to the necessity for, or the justice or reasonableness of the rule, which would deny the official character of the president of a national corporation, which is a Federal agency, when traveling in those parts of the United States in which the corporation owns no property and does no business, and of the right of such a corporation to immunity from suits in the Federal courts, elsewhere than in the district where is the seat of the corporation, there is no rule of convenience, or, as it seems to me, of justice, which requires this court to hold that Mr. Ripley was not a person "authorized to accept service" on behalf of the Santa Fe Pacific Railroad Company, at the time of the service of process upon him in the original case. Mr. Justice Rogers, of the Supreme Court of Pennsylvania, in 1827, anticipating by many years the doctrine of jurisdiction by implied consent, said:

> "It is difficult to conceive, that if corporations are artificial persons (if they can do all acts that natural persons may—if they can sue within a foreign jurisdiction), why they should not also be liable to suit, in the same manner, and under the same regulations as domestic corporations. The reason why they have not been, in point of fact, more frequently sued, is given by Chief Justice Spencer, in 16 Johns. 7. The process against a corporation, by the common law

must be served on its head or principal officer, within the jurisdiction of the sovereignty where this artificial body exists. If the president of a bank of another state were to come within this state, he would not represent the corporation here; his functions and his character would not accompany him, when he moved beyond the jurisdiction of the government under whose laws he derived his character. That this would be the case, when he was within the state on business unconnected with the corporation, there can be no question, but where a corporation locates the president, or other officers within the state, for the express purpose of making contracts here, whether process served on him, would not be sufficient, is a question which I shall not undertake to determine, because it does not necessarily arise. There is nothing, then, in the nature of a corporation to exempt it from suit; the difficulty arises from there being no person within the limits of the state on whom you can serve your process.

"With the multiplication of corporations, which has and is taking place to an almost indefinite extent, there has been a corresponding change in the law in relation to them. There was a time when it was supposed that no suit could be sustained against them, unless upon an express contract under the seal of the corporation; it is now held, that they are liable in trespass, and in case upon an implied contract. *7 Mass. 169; 7 Cranch 299; 4 Serg. & Rawle 16; 14 Johns. 118.* This change in the law has arisen from a change of circumstances, from that silent legislation by the people themselves, which is continually going on in a country such as ours, the more wholesome, because it is gradual, and wisely adapted to the peculiar situation, wants and habits of our citizens."

Bushel et al v. Com. Ins. Co., 15 Serg. & R. 176.

"A corporation, though legally considered a person, must perform its corporate duties through natural persons, and is impersonated in and represented by its principal officers, the president and directors, who are not merely its agents, but are, generally speaking, the representatives of the corporation in its dealings with others."

Louisville &c. Ry. Co. v. Louisville Trust Co. 174 U. S. 573.

"The object of all service of process, for the commencement of a suit, or any other legal proceeding, is to give notice to the party proceeded against, and any service which reasonably accomplishes that end, answers the requirements of natural justice and fundamental law."

Gibbs v. Queen Ins. Co., 63 N. Y. 114.

It so happens that, in the original case, the cause of action is transitory, and is in tort; but any rule, as to the sufficiency of the service of process, which is applicable to the principal case, would be equally applicable, if the action had been ejectment, and had involved the title to the whole, or any part, of the lands acquired and held by the Santa Fe Pacific Railroad Company, under the authority of Congress. It seems contrary to the principles of natural justice that the courts of the Territory of New Mexico must be forever open to the Santa Fe Pacific Railroad Company, for the protection of its rights, while it is not compellable to answer in those same courts, for wrongs committed within that Territory; that if it has a cause of action against the Caledonian Coal Company, it may

invoke the aid of the Territorial court for its enforcement, but if the Caledonian Coal Company has a cause of action against it, that company must go elsewhere for redress. Such a rule would deny a remedy to the people of New Mexico in all actions local in their nature.

It the case of the *Railroad Company v. Harris, 12 Wall. 65*, this court considered the sufficiency of the service of process issued by a court of the District of Columbia, and served upon the president of the Baltimore and Ohio Railroad Company, a Maryland corporation, within the District of Columbia, and while it is true, that, in that case, no question was made that the railroad company was "doing business" within the District of Columbia, it is also true that there was no statute of the District of Columbia authorizing suits against foreign corporations within the District, and that the Baltimore and Ohio Railroad Company was doing business within the District by the permission of Congress. Answering the proposition that, although the company was in the District of Columbia, doing business by authority of Congress, it was not suable there, Mr. Justice Swayne, speaking for this court, said:

> "Here the question is whether the company was suable in the District of Columbia. In the case reported in Grattan, it was said: 'It would be a startling proposition if in all such cases citizens of Virginia and others should be denied all remedy in her courts, for causes of action arising under contracts and acts entered into or done within her territory, and should be turned over to the courts and laws of a sister State to seek redress.' The same considerations apply to the case before us. When this suit was

> commenced, if the theory maintained by the counsel for the plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress short of the seat of the company in another State. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility. It is not to be supposed that congress intended that the important powers and privileges granted should be followed by such results."

I earnestly insist that the Congress of the United States has granted to the Santa Fe Pacific Railroad Company a franchise to hold lands within the Territory of New Mexico, which is of enormous value; a franchise which could not have been granted by the legislature of New Mexico, nor by the legislature of any State; a franchise which so identifies it with the people of New Mexico that great injustice must necessarily follow if it may not be sued in the Territorial courts, and that all that was said by this court in the Harris case, which I have quoted, is equally applicable here.

There is another aspect in which this decision merits the careful consideration of the court. The acts of Congress, under which the Caledonian Coal Company is seeking redress in the principal action, contain highly penal provisions, and subject the Santa Fe Pacific Railroad Company to indictment, and heavy fines, if it has committed the acts of which the Caledonian Coal Company complains. If it is under no obligation to submit itself to the jurisdiction of

the district court of the second judicial district of the Territory of New Mexico, in a civil action, by reason of the service of a summons issued out of that court, upon its president, while within that district, neither can it be required to answer an indictment, should one be found against it, for a violation of those statutes, by a grand jury, duly empaneled in that court, to inquire into offenses committed against the laws of the United States. If, by the sale of its railway franchises and property, by the permission of Congress, it is no longer liable to be sued in a civil action in the courts of the Territory, sitting for the trial of civil causes arising under the Constitution and laws of the United States, *without its consent*, neither is it liable to be punished criminally for the doing of acts to which Congress has attached the severest penalties. The only process available in either case, whether the proceeding be by complaint or declaration in a civil action, or by indictment or information in a criminal proceeding, is a summons, and the principle which this court declares to be applicable to all courts is equally applicable to all forms of procedure, whether civil or criminal. If President Ripley is not a person authorized to accept service in behalf of his corporation in the one case, neither is he in the other; and if jurisdiction cannot attach in the one case, neither can it attach in the other.

Has the Santa Pacific Railroad Company, by the permission of Congress, become a fugitive from justice? For an offense committed against the laws of the United States, within the Territory of New Mexico, it cannot be tried elsewhere, and the process of the Territorial courts

has never been supposed to run beyond the limits of the Territory. If a summons in a criminal case, arising in New Mexico, under the laws of the United States, can be served in New York, Illinois or Kansas, a like summons, in a civil case arising under the same laws could also be served there; but I submit that such service would be of no validity in either case.

Congress, by the act known as the Elkins act, has abolished imprisonment as a part of the punishment for violations of the interstate commerce law, and has provided for the indictment of corporations, but has provided no method of subjecting them to the jurisdiction of the courts, or of compelling them to answer such indictments. Notwithstanding this omission, I submit that the proper and only method of acquiring such jurisdiction is a summons substantially in the form, and with the same effect, as a summons in a civil action.

U. S. v. John Kelso Co. 86 Fed. 304.
Com. v. R. R. Co. 165 Pa. St. 162.
R. R. Co. v. State, 32 N. H. 215.
State v. R. R. Co., 89 N. C. 584.

I respectfully submit that the ends of justice will be subserved by a rehearing and reconsideration by the court of the questions involved in this case, and I respectfully ask that the same may be granted.

I hereby certify that this application is not made for delay, but because I believe it to be well founded.

Respectfully submitted,

NEILL B. FIELD,
Counsel for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 419.

THE TERRITORY OF NEW MEXICO, ex rel. CALEDONIAN COAL COMPANY, *Appellant,*

vs.

BENJAMIN S. BAKER, Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the Second Judicial District Court thereof, *Appellee.*

No. 419.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF FOR APPELLEE.

STATEMENT.

As the present proceeding is an indirect method of reviewing the ruling of the District Court of New Mexico upon the motion to quash the service of summons in respect to the Santa Fe Pacific Railroad Company in the action brought therein by the relator, it would seem that the petitioner ought to have attached to its application for mandamus a certified copy of the entire record of the action pending in the District Court, in order that the Supreme Court might determine therefrom whether the District Court erroneously ruled or not upon the motion. This was not done, and the case simply stands

upon the answer of the respondent. It does not appear whether there was any statement or charge in the declaration or pleadings, filed in the case pending in the District Court, that the Santa Fe Pacific Railroad Company was at the time of the institution of the suit or attempted service upon its president engaged in transacting its business as a common carrier within the territorial limits of the District Court, nor that it had any agency or agent representing it therein. The return upon the summons served, which is set forth in the petition, does not show that the Santa Fe Pacific Railroad Company was at the time doing business in the territory or that Mr. Ripley was representing it therein as its president. There is nothing from the return which would show that that corporation was at the time within the territorial jurisdiction of that court or that the service was valid. It is admitted in the petition that the Santa Fe Pacific Railroad Company had, prior to the institution of the action pending in the District Court, sold its railroad to The Atchison, Topeka and Santa Fe Railway Company under authority of congress; that it simply owned certain lands within the said judicial district, and that there was still pending in the District Court of Bernalillo County, New Mexico, suits relating to the title and right of possession to parcels of said lands. The evidence introduced on the motion to quash showed that these suits had been instituted prior to the sale of its railroad, and, therefore, prior to the institution of the action in question, so that it appears that there was then simply pending certain actions in ejectment against trespassers upon its property in the Territory of New Mexico. It appeared conclusively and was admitted that the Santa Fe Pacific Railroad Company had no office or place of business in

the Territory of New Mexico at the time of the institution of the action; that it was not then operating any railroad or engaged in business as a common carrier in said district; that no place was fixed in its articles of incorporation for the keeping of its principal office or place of business, but that its by-laws required annual meetings of its board of directors to be held at the office of said company in the City of New York; that the summons was served upon its president, Mr. Ripley, while he was passing through the Territory of New Mexico as a passenger upon one of the trains of The Atchison, Topeka and Santa Fe Railway Company; that its land commissioner has his office in the City of Topeka, State of Kansas, and President Ripley has and has had his office in the City of Chicago, State of Illinois.

The Santa Fe Pacific Railroad Company was organized by purchasers of the railroad and property of the Atlantic and Pacific Railroad Company, under foreclosure proceedings instituted against the latter, under an act of Congress approved March 3, 1897 (29 U. S. Stats. at Large, p. 622 *et seq.*) entitled "An Act to define the rights of purchasers under mortgages authorized by an act of Congress, approved April 20, 1871, concerning the Atlantic and Pacific Railroad Company." Under this act, the Santa Fe Pacific Railroad Company at that time acquired the railroad of the Atlantic and Pacific Railroad Company extending from Albuquerque to California, and such of its lands as had been acquired under its land grant and which remained then undisposed of, together with the rights, powers, privileges, grants and franchises granted to the Atlantic and Pacific Railroad Company by a previous act of Congress. Prior to the institution of the action in question and under authority

of an act of Congress approved June 27, 1902, entitled "An Act authorizing the Santa Fe Pacific Railroad Company to sell or lease its railroad, property and franchises, and for other purposes" (32 U. S. Stats. at Large, Part I, page 405), which required such sale to be made on or before January 1, 1904, said railroad company sold and conveyed its railroad property to The Atchison, Topeka and Santa Fe Railway Company, and was not, therefore, engaged at the time of the service of summons in the business of a common carrier for which it had been incorporated.

In the absence of a complete record of the action pending in the District Court, every presumption is in favor of the validity of the ruling of the District Court upon the motion to quash.

Relator's application for a writ of mandamus to the judge of the District Court to assume jurisdiction over the Santa Fe Pacific Railroad Company, being heard upon the petition or application and answer, was denied upon the grounds stated in the opinion of the Territorial Supreme Court, reported in the case of *Territory ex rel. Caledonian Coal Company* v. *Baker, Justice, et al.*, 78 Pacific Reporter, page 624 *et seq.* This is an appeal from an order of the Territorial Supreme Court dismissing said application.

ARGUMENT.

The main question for consideration is—Does it sufficiently appear that the District Court obtained jurisdiction in a personal action so as to enable it to render a personal judgment against the Santa Fe Pacific Railroad Company by the service made on its president while he was casually passing through the district and was not at the time representing the railroad company? Was the railroad company so identified with its president at the time in that district, or, in other words, was it so impersonated in him at that time and place, as to render the service of summons upon him a service upon it so as to subject it to the orders or judgments of that court?

Under our system, courts are constituted to administer the law as between litigants who are found or come within the territory over which such court is given jurisdiction, and while its process may affect property rights within its territorial jurisdiction where authorized, its process does not run outside of such limits so as to affect persons beyond those limits, unless the legislative authority creating the particular court expressly so authorizes and such legislative authority may be exercised over such other territory.

In the act creating the Territory of New Mexico, approved September 9, 1850, we find provided in Section 10 (9 U. S. Stats. at Large, page 449), that that territory was divided into three judicial districts, and that a district court should be held in each of said districts. By Section 16 of the same act, same statutes, page 452, the method for defining the territorial limits of these judicial

districts was prescribed. Section 1030, page 336, of the Compiled Laws of New Mexico, 1897, defines the territorial limits of each of the judicial districts in that territory.

It was, therefore, stated by Mr. Justice Gray, in delivering the opinion of this court, in the case of *Goldey* v. *Morning News,* 156 U. S. 521:

> "It is an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service."

The same principle had been tersely announced by Mr. Justice Jackson in the case of *Mexican Central Railway* v. *Pinkney,* 149 U. S. 209, as follows:

> "But it is well settled that no court can exercise, at common law, jurisdiction over a party unless he is served with the process within the territorial jurisdiction of the court, or voluntarily appears."

See, also:

Harris v. *Hardeman,* 14 How. 339.

A corporation having but an artificial existence can only act through or be represented by agents. The authority and power of such agents to represent the corporation are necessarily limited, and this is true of the president of the corporation. He is an agent with limited authority in respect to representing the corporation. He is not the corporation and does not carry it about with him on his journeys.

Generally speaking, the board of directors, in meetings duly had, represents and acts for the corporation in

the general management of the corporate business. But even such board does not in all respects represent the legal entity, the corporation.

In speaking of the jurisdiction over a foreign corporation by service of process upon its president while temporarily in the state for either business or pleasure, the Supreme Court of Pennsylvania, in the case of *Phillips et ux* v. *Burlington Library Company*, 141 Pa. St. 462; s. c. 21 Atl. 640. said:

> "Under such circumstances he (the president) is not here in his representative capacity. He is not the corporation, nor does he bring it here. If the rule were otherwise, he would carry the corporation with him upon a trip around the world, and subject it to the jurisdiction of every country he might visit. We will not designate such a proposition as absurd, but it certainly has not a shadow of reason to sustain it."

If the rule were otherwise, the president of this corporation, while on a pleasure trip to Alaska or the Philippine Islands, or while in such place on the business of some other corporation of which he might be an officer, might subject this corporation to the process of the courts of those territories. A mere statement of the proposition should be sufficient to show its unreasonableness.

A corporation can be said to have a technical habitat or place of residence only in the state or district where its corporate meetings are held.

Galveston, Harrisburg & San Antonio Ry. Co. v. *Gonzales*, 151 U. S. 496.

Interstate Commerce Commission v. *Texas & Pacific Ry. Co.*, 57 Fed. 949.

Jones v. *Scottish Accident Ins. Co.*, L. R., 17 Q. B. Div. 421.

Watkins v. *Scottish Imperial Ins. Co.*, L. R., 23 Q. B. Div. 285.

Frick Co. v. *Norfolk & O. R. Co.*, 26 Fed. 725.

As a corporation created in one state was regarded as having no legal existence outside the limits thereof, so it was first held that it could not be sued in another state, but inasmuch as it could only do business in such other state by the license or permission of such state, it was finally held that where it did business there and the statutes of such state authorized or directed a service upon it by service upon a resident agent, the corporation by engaging in business there impliedly consented to be served in that manner and to be bound by such service.

So it was stated in the early case of *Lafayette Insurance Co.* v. *French,* 18 How. on page 408:

> "For the purpose of receiving such service and being bound by it, the corporation is identified with such agent or officer."

Of course, a federal corporation does not exercise its rights or transact its business by leave or license of any state or territory, and the same reasoning would not apply. It is not necessary, however, to stand upon that position in this case, since, under general principles, the service in question would not be recognized as valid, even in a collateral proceeding. It is now well settled that the service of summons, even upon the president of a corporation while temporarily in a state or district in which the corporation is not at the time transacting its business, is not a valid service upon the corporation, even though the local laws should authorize the same, because such president does not then represent that corporation and the corporation is not itself, by any authorized agent

for such purpose, within the territorial jurisdiction of the court.

This, in effect, was decided in an elaborate and well-considered opinion by the late Mr. Justice Field, in *Saint Clair* v. *Cox*, 106 U. S. 350.

See, also, the more recent opinion of the late Mr. Justice Gray, in *Goldey* v. *Morning News*, 156 U. S. 518.

Fitzgerald Construction Company v. *Fitzgerald*, 137 U. S. 106.

Mecke v. *Valleytown Mineral Company*, 93 Fed. 697.

Beale on Foreign Corporations, Sec. 270.

Neither can it make any difference even though the corporation at some period prior to the service had been engaged in business in the particular state or district, or that some officer of the corporation had at all times resided therein. The corporation has the right to withdraw from the state or district, and when it is no longer represented in such state or district by an agent transacting therein its ordinary business, it cannot be said to be present therein at the time.

See:

Conley v. *Mathieson Alkali Works*, 190 U. S. 406.

Geer v. *Mathieson Alkali Works*, 190 U. S. 428.

DeCastro v. *Compagnie Francaise Du Telegraphe, etc. Company*, 76 Fed. 426.

Earle v. *Chesapeake & Ohio R. Co.*, 127 Fed. 235.

Cady v. *Associated Colonies*, 119 Fed. 420.

Eldred et al. v. *American Palace-Car Company*, 105 Fed. 455.

Beale on Foreign Corporations, Secs. 281 and 279.

It is not neecssary here to notice cases in which, by particular statute, a state may have required a foreign corporation to appoint or designate a particular agency within such state upon whom process might be served in suits arising out of the business transacted therein. In some cases, no doubt, the appointment under some such statute might be construed as irrevocable.

But it is claimed that the Sante Fe Pacific Railroad Company still owns lands within the territory of New Mexico. This it may do, however, without being represented therein by any authorized agency. By owning or holding lands in such district it is not to be regarded as doing or transacting its business therein.

Missouri Coal & Mining Co. v. *Ladd,* 160 Mo. 435; s. c. 61 S. W. Rep. 191.

The court of a proper district might, in such proceedings as were authorized by law, and in special cases, obtain jurisdiction over the property of a corporation within the territory, but it could not obtain jurisdiction over the corporation in a personal action by reason of that fact.

The test is—Has the corporation an agency within the district transacting therein its ordinary business so that it may be said to be impersonated in or represented by such agency for general purposes, including its subjection to the service of process therein?

In *Saint Clair* v. *Cox,* 106 U. S., on pages 351 and 352, it appeared that the corporation in that case had property within the district in which the suit was brought and personal judgment rendered, but the judgment was held invalid notwithstanding that fact.

The same fact also appeared in *United States* v.

American Bell Telephone Company, 29 Fed. 17. In an elaborate opinion therein by the late Mr. Justice Jackson of this court, then Circuit Judge, he sums the matter up, on pages 34 and 35, as follows:

> "We think the decisions of the Supreme Court have settled and established the proposition that, in the absence of a voluntary appearance, three conditions must concur or co-exist in order to give the federal courts jurisdiction *in personam* over a corporation created without the territorial limits of the state in which the court is held, viz.: (1) It must appear as a matter of fact that the corporation is carrying on its business in such foreign state or district; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such state; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there as a condition, express or implied, of doing business in the state."

In other words, to give the court jurisdiction, there must be within the district an agent who is at the time representing the corporation carrying on its ordinary business, and such agent must be served with the process.

Neither can it make any difference if it should appear that the corporation was still prosecuting pending suits against trespassers upon its lands, nor does it make much difference whether such suits were pending at the time of the service of process in the particular case or instituted thereafter. It must be assumed that in the prosecution of such suits the corporation is represented by some attorney at law, but such attorney would represent the corporation only in and for the purposes of such particular suits, and for the purpose of prosecuting such particular suits the corporation can only be regarded as voluntarily entering its appearance in the courts of such

district. It cannot be assumed that by so suing to protect its property rights it submits itself generally to the jurisdiction of the courts of that district, so as to authorize an independent suit or proceeding to be instituted against it. It would hardly be pretended that a service of a summons in an independent suit could be validly made upon an attorney at law who was only appearing and was only authorized to represent the corporation in some pending litigation which had no possible connection with a suit subsequently instituted against it.

By prosecuting such suits it is not doing business in the territory.

McCall v. *Mortgage Co.*, 99 Ala. 427; s. c. 12 South. 806.

St. L., A. & T. Ry. Co. v. *Fire Assn.*, 55 Ark. 163; s. c. 18 S. W. 43.

Utley v. *Mining Co.*, 4 Colo. 369.

It is, therefore, not "found" in the territory by reason of the pendency or bringing of suits.

It will be claimed, however, that as the Santa Fe Pacific Railroad Company was organized under an Act of Congress and is, therefore, a federal corporation, it is an inhabitant or a domestic corporation of the territory. It is not a domestic corporation of New Mexico in the sense that it was created by the laws of that territory, or that it owes its existence to such laws. It could hardly be regarded as an inhabitant of or domiciled within every state and territory of the United States merely by reason of being a federal corporation.

Being incorporated by Congress, it may be technically regarded as a citizen of the United States, as a coporation incorporated under the laws of a particular state is regarded as a citizen of such state. This, however,

would not make it a citizen of every or any state in the Union. Neither could it be regarded as a resident in any state or territory unless, indeed, its corporate offices were located and held therein.

It is true that in the case of *Commonwealth* v. *Texas & Pacific Railroad Company*, 98 Penn. St. 90, the Supreme Court of Pennsylvania held that the Texas and Pacific Railroad Company, being chartered by Congress, was not a foreign corporation within the meaning or intendment of the statute of that state imposing a license tax upon foreign corporations doing business in that state, since the statute pointed out what corporations were to be regarded as foreign corporations and did not include therein those chartered by Congress. This decision seems to be the basis of some error in certain courts holding that a federal corporation was to be regarded as a domestic corporation in every state in which it carried on its business. Of course, the Pennsylvania case might properly have been decided upon the ground that a state could not validly tax a federal corporation for the privilege of transacting its business therein, since such corporation did not derive that right or privilege from such state.

The real test, after all, is—Is the corporation in question personally within the territorial limits of the court from which the process issues? Is it there by an agent who is at the time representing it in the transaction of its ordinary business so that it might be inferred that the corporation has consented to be subjected to the jurisdiction of the particular court by service upon some officer or agent who might be found therein, and, who, at the time, is representing it in the transaction of its business?

But it will be claimed that the jurisdiction of the territorial court over the controversy and, therefore, over parties thereto is the same as that conferred upon the United States Circuit Courts in like cases, and that the suit in question is one to recover damages for an alleged violation of the Interstate Commerce Law and of the Sherman Anti-Trust Law. In Section 10 of the Act approved September 9, 1850 (9 United States Statutes at Large, p. 450), creating this territory, it was provided:

> "And each of the said District Courts shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States, * * * and the first six days of every term of said courts, or so much thereof as shall be necessary, shall be appropriated to the trial of causes arising under the said Constitution and laws," etc.

A general provision of this nature is found incorporated in Section 1910 of the United States Revised Statutes.

As this jurisdiction of the District Court is evidently invoked in this case, it is, perhaps, not proper at this time or in this collateral proceeding to determine whether the jurisdiction over this particular controversy does in fact exist or not,—that is, whether Section 1910 above vests in such District Courts jurisdiction over controversies which, by subsequent Acts of Congress, is vested exclusively in the Circuit or District Courts of the United States. It is evident, however, that for the purpose of assuming jurisdiction over such controversy, the Territorial Court could only assume like jurisdiction over the person of a defendant thereto as is given Circuit Courts of the United States in such cases.

Section 9 of the Interstate Commerce Law, approved

February 4, 1887 (24 United States Statutes at Large, p. 382), provides, that any person claiming to be damaged by a violation of the provisions of that Act may bring suit for the recovery of such damages for which the common carrier may be liable under the provisions of that Act, "in any District or Circuit Court of the United States of competent jurisdiction."

A Territorial District Court is neither a "District or Circuit Court of the United States."

Reynolds v. *United States,* 98 U. S. 145, 154.
McAllister v. *United States,* 141 U. S. 174, and authorities cited in the opinion of Mr. Justice Harlan.

What is a court of "competent jurisdiction," referred to, is defined by the general Act of March 3, 1887, defining the jurisdiction of the Circuit Courts, and in a controversy of this nature a defendant thereto could only be sued in a district whereof he is an inhabitant.

Union Switch and Signal Company v. *Hall Signal Company,* 65 Fed. 625.

So far, however, as the count in the declaration concerning recovery of damages growing out of an alleged violation of the Sherman Anti-Trust Act is concerned, by Section 7 of that Act, such suit may be brought "in any Circuit Court of the United States in the district in which the defendant resides or is found."

Act of July 2, 1890, Chap. 647, Sec. 7 (26 U. S. Stats. at Large, p. 210).

The words "is found," used in said section, were also used in the Act of 1875, concerning the jurisdiction of the United States Circuit Courts, and has been frequently defined in respect to service upon corporations. The

general principles announced in the cases heretofore cited have been strictly adhered to in construing such provision. A corporation is not deemed to be "found" within a district, unless it is transacting therein its ordinary business through an agent who is there representing it in the conduct of its business.

See:

United States v. *American Bell Telephone Company*, 29 Fed. 34, followed and approved by Mr. Justice Brown, of this court, then District Judge, in *Maxwell* v. *A., T. & S. F. R. R. Co.*, 34 Fed. 286, 289.

Bentlif v. *London and Colonial Finance Corporation*, 44 Fed. 667.

Clews v. *Woodstock Iron Company*, 44 Fed. 31.

St. Louis Wire-Mill Company v. *Consolidated Barb-Wire Company and others*, 32 Fed. 802.

Good Hope v. *Railway Barb Fencing Company*, 22 Fed. 635.

The Sante Fe Pacific Railroad Company having been organized mainly for the purpose of acquiring and operating the railroad formerly owned by the Atlantic and Pacific Railroad Company and engaging in the business of a common carrier, when it disposed of this railroad and ceased that business and no longer had any office or place of business within the territory, it is obvious that it was not "found" in the territory or represented therein by any authorized agent merely because its president was casually passing through the same. Its holding of land in the territory was merely incidental, but the holding or disposing of the same did not require it to have an agent in the territory, and it does not appear that there was

any agent there for that purpose. Neither can its prosecution of suits through an attorney at law be regarded as an implied consent on its part to be subjected generally to suits arising out of entirely independent matters. The service was, therefore, unquestionably invalid and was properly set aside. Even assuming, therefore, that this court has jurisdiction upon this appeal, which may be questioned, it is clear that the order of the Supreme Court of the Territory dismissing the application for a mandamus was correct and should be affirmed.

Respectfully submitted.

ROBERT DUNLAP,
Attorney for Appellee.

E. D. KENNA,
Of Counsel.

Supreme Court of the United States.

No. 419.—October Term, 1904.

The Territory of New Mexico ex rel. Caledonian Coal Company, Appellant,
vs.
Benjamin S. Baker, Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the Second Judicial District Court thereof, &c.

Appeal from the Supreme Court of the Territory of New Mexico.

[February 20th 1905.]

Mr. Justice Harlan delivered the opinion of the Court.

This appeal brings up for review a final judgment of the Supreme Court of the Territory of New Mexico denying an application to that court by the Caledonian Coal Company for a writ of mandamus to compel Benjamin S. Baker, Judge of the District Court of the Second Judicial District of that Territory, to take cognizance of a certain action brought in that court against the Santa Fe Pacific Railroad Company and others.

The petition for mandamus makes the following case:

On the 17th day of February 1904 the Caledonian Coal Company, organized under the laws of New Mexico, commenced an action in the District Court of the Second Judicial District of that Territory against the Santa Fe Pacific Railroad Company, the Atchison, Topeka and Santa Fe Railroad Company, the Colorado Fuel and Iron Company and the American Fuel Company, to recover damages for alleged violations of the Interstate Commerce Act of 1887 and the Anti-Trust Act of 1890.

By the 9th section of the above act of 1887 it is provided that "any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. . ." 24 *Stat.* 379, *c.* 104. And by section 7 of the above act of 1890 it was provided that "any person who shall be injured in his business or property by any other person or corporation by reason of anything

forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the District in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." 26 *Stat.* 209, *c.* 647.

A summons was issued against the Santa Fe Pacific Railroad Company and was returned by the Marshal of the Territory, the return stating that it was served at the above district on the 13th day of May 1904, by delivering a true copy thereof, with a copy of the complaint thereto attached, to E. P. Ripley, President of the defendant corporation.

The Santa Fe Railroad Company is a corporation organized and existing under the act of Congress of March 3d 1897, defining the rights of purchasers under mortgages authorized by an act of Congress approved April 20th 1871, concerning the Atlantic and Pacific Railroad Company. 29 *Stat.* 622, *c.* 374.

When the grievances set out in the petition were committed, the Santa Fe Pacific Railroad Company was the owner of a line of railroad within the Second Judicial District of New Mexico and elsewhere within that Territory, but which line, at the commencement of this action, had been sold and transferred to, and was being operated by, the Atchison, Topeka and Santa Fe Railroad Company under a conveyance authorized by an act of Congress of June 27th 1902, 32 *Stat.* 405, *c.* 1159; was the owner of several hundred thousand acres of land within that District; and, at the commencement of the action for damages, was prosecuting in one of the counties of the Territory, within the same District, suits involving the company's title and possession of parts of those lands.

All of those lands, with the rights, privileges and franchises appertaining thereto, were acquired by the Santa Fe Pacific Railroad Company as the successor of the Atlantic and Pacific Railroad Company, to which last named company they were granted by the act of Congress of July 27th 1866. 14 *Stat.* 292, *c.* 278.

The petition for mandamus alleged that by reason of the above facts the Santa Fe Pacific Railroad Company was an "inhabitant" of the Second Judicial District of New Mexico, and by reason of the presence of Ripley, its President, in that Territory and within that District and the service of summons in the above action upon him as such President, the company was "found" in the District within the meaning of the acts of Congress.

Nevertheless, the defendant Baker, Associate Justice of the Supreme Court of the Territory and Judge of the District Court of the Second Judicial District, quashed the return of the above summons and refused to assume jurisdiction of the action, so far as the Santa Fe Pacific Railroad Company was concerned, or to require that company to answer the declaration or complaint filed by petitioner.

The defendant Baker made a return to a rule issued against him to show cause. From that return it appears that the Santa Fe Pacific Railroad Company specially appeared in the action for the purpose of moving and did move to quash the service of process, upon grounds set forth in an affidavit of its President. In that affidavit Ripley stated that when served with summons he was only a passenger on a railroad train passing through the Territory; that the company had its office in the city of New York, while its Land Commissioner had an office at Topeka, Kansas, and its President an office at Chicago, Illinois; that the company had no property in the Territory of New Mexico, except lands acquired by it under a foreclosure of a mortgage of the Atlantic and Pacific Railroad Company, and which lands were undisposed of; that it has had no office or place of business in the Territory since the sale of its road. This affidavit was used on the hearing of the motion to quash, and the facts stated in it were not contradicted.

The contention of the company, therefore, was that the service in question was insufficient to bring the company, personally, before the court.

The return of the Judge also stated that the actions in ejectment brought by the railroad company against trespasses upon its property were instituted prior to the sale of its railroad property and franchises to the Atchison, Topeka, and Santa Fe Railroad Company; and that the refusal of the Judge to assume jurisdiction in the case referred to was upon the ground that the service upon Ripley as President of the Company was not, in his opinion, sufficient to subject it personally to the jurisdiction of the court.

The relief sought was an alternative writ of mandamus, directing Judge Baker to assume jurisdiction of the cause, so far as the Santa Fe Railroad Company was concerned, and to require that company to plead, answer or demur.

The Supreme Court of the Territory, after hearing the case, upon the pleadings, return and the proofs, denied the petition for mandamus and dismissed the application. From that order the present appeal was prosecuted.

At the present term the appellant suggested that Judge Baker had been succeeded in office by Judge Ira A. Abbott. And it moved that such order be made in the premises as would be conformable to the rules and practice of this court. Judge Abbott consents that the action may be revived against him as the successor of Judge Baker, and proceed to a hearing, without further summons or notice, upon the record as now presented to the court.

The first question to be considered is whether it is competent for this court, Judge Baker having ceased to be Judge, to substitute the name of his successor, as the appellee.

In *United States* v. *Boutwell*, 17 *Wall.* 604, 607, which was a mandamus against Mr. Boutwell as Secretary of the Treasury, it appeared that after the case was brought to this court the defendant resigned his office. Thereupon a motion was made to substitute the name of his successor, Mr. Richardson. It did not appear that any previous application was made to the latter for leave to substitute his name, and he opposed the motion, which was denied.

Mr. Justice Strong delivered the opinion of the court, saying: "The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent. That duty may have originated in one way or in another. It may, as is alleged in the present case, have arisen from the acceptance of an office which has imposed the duty upon its incumbent. But no matter out of what facts or relations the duty has grown, what the law regards and what it seeks to enforce by a writ of mandamus, is the personal obligation of the individual to whom it addresses the writ. If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, in substance a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. Hence it is an imperative rule that previous to making application for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant, and it must appear that he refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively inferred. Thus it is the personal default of the defendant that warrants impetration of the writ, and if a peremptory mandamus be awarded, the cost must fall upon the defendant." The court proceeded: "It necessarily follows from this, that on the death or retirement from office of the original defendant, the writ must abate in the absence of any statutory provision to the contrary. When the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. And if a successor in office may be substituted, he may be mulcted in costs for the fault of his predecessor, without any delinquency of his own. Besides, were a demand made upon him, he might discharge the duty and render the interposition of the court unnecessary. At all events, he is not in privity with his predecessor, much less is he his predecessor's personal representative. As might be expected, therefore, we find no case in which such a substitution as is asked for now has ever been allowed in the absence of some statute authorizing it."

That case was followed by *United States* v. *Chandler*, 122 *U. S.* 643; *United States* v. *Lochren*, 164 *U. S.* 701; *Warner Valley Stock Co.* v. *Smith*, 165 *U. S.* 28, and *United States ex rel. &c.* v. *Butterworth*, 169 *U. S.* 600, 604–5. In the latter case the court, after referring to prior cases, concluded its opinion in these words: "In view of the inconvenience, of which the present case is a striking instance, occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that, in the case of suits against the heads of Departments abating by death or resignation, it should be lawful for the successor in office to be brought into the case by petition, or some other appropriate method."

Later, Congress, its attention being thus called to the matter, passed the act of February 8th 1899, c. 121, by which it was provided: "That no suit, action or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States, in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but in such event the court, on motion or supplemental petition filed at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the court may make such order as shall be equitable for the payment of costs." 30 *Stat.* 822.

In view of the reasons assigned, in the Boutwell case, for the inability of the court, in mandamus proceedings, to substitute an existing public officer as a party in the place of his predecessor, who had ceased to be in office, we perceive [redacted] why, under the act of 1899, the successor of Judge Baker may not be now made a party in his stead. Certainly, the statute authorizes that to be done if, in the judgment of the court, there is a necessity for such action in order to obtain a settlement of the legal question involved. We think such a necessity exists in this case, and as Judge Abbott waives any formal summons and consents to the substitution of his name in place of that of Judge Baker, the motion of appellant is granted, and such substitution is ordered to be and is now made, subject, however, to the condition that he shall not be liable for any costs prior to this date.

do not

We come now to the merits of the case.

The act under which the Territory of New Mexico was created and organized, approved September 9th 1850, provides that the legislative power of the Territory of New Mexico should extend to all rightful subjects of legislation consistent with the Constitution of the United States. The same act divides the Territory into three judicial districts and requires a District Court to be held in each of such districts by one of the

Justices of the Territorial Supreme Court. It also provides: "Each of the said District Courts shall have and exercise the same jurisdicion, in all cases arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States; . ." This provision was retained in the Revised Statutes of the United States. § 1910.

The present case clearly arises under the laws of the United States; for, the action brought in the Territorial District Court was expressly based on the Interstate Commerce Act of 1887 and the Anti-Trust Act of 1890.

And the question arises upon the very face of the record whether the Territorial District Court could take cognizance at all of suits for damages authorized by those acts. We have seen that by section 9 of the above act of 1887 any person or persons alleged to have been damaged by a common carrier, embraced by the provisions of that act, may bring suit in his or their own behalf "in any District or Circuit Court of the United States of competent jurisdiction;" and by the above act of 1890 any person injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by that act may sue therefor "in any Circuit Court of the United States in the district in which the defendant resides or is found."

Although by the statutes in force prior to the passage of the Interstate Commerce (1887) and Anti-Trust Acts (1890), the Territorial District Courts of New Mexico were given the same jurisdiction in cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States, are those acts to be construed as excepting from the general jurisdiction of the Territorial District Courts cases that may arise under them? In other words, can a suit for damages under either of those acts be brought in any court except, under the act of 1887, in a Circuit or District Court of the United States, and, under the act of 1890, in a Circuit Court of the United States? Did Congress intend that only Courts of the United States, invested by the Third Article of the Constitution with the judicial power of the United States (*McAlister* v. *United States*, 141 *U. S.* 174) should have original jurisdiction of suits of that character? The questions suggested by these inquiries were not much discussed by counsel, and we pass them as being, in our view of the case, not necessary to be now decided; for, if a controversy like that raised by the plaintiff is equally cognizable by a Territorial District Court or by a Circuit or District Court of the United States, it would still remain to inquire whether the defendant company was brought before the court in which the suit was instituted in such way that a personal judgment could be rendered against it?

It is firmly established that a court of justice cannot acquire jurisdiction over the person of a defendant, "except by actual service of notice upon

him within the jurisdiction or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service." *Goldey* v. *Morning News*, 156 *U. S.* 521; *Pennoyer* v. *Neff*, 95 *U. S.* 714; *Mexican Central Railway* v. *Pinkney*, 149 *U. S.* 209; *United States* v. *American Bell Tel. Co.*, 29 *Fed. Rep.* 17. This principle is applicable to all courts.

We are of opinion that the service of summons upon Ripley, as President, while he was passing through the Territory on a railroad train was insufficient as a personal service on the company of which he was President. It is true that the company owned lands in the Territory, but its office, at the which the meetings of its directors were held, was in the city of New York, while the office of its Land Commissioner was at Topeka, Kansas, and the office of its President was at Chicago, Illinois. The mere ownership of lands in New Mexico, or the bringing of suits there to protect its lands against trespasses, could not have had the effect to put the company into that Territory for the purposes of a personal action against it based on service of summons upon one of its officers while passing through the Territory on a railroad train. If by the laws of New Mexico a party having a cause of action against the company, based on the acts of 1889 and 1890, could have sued out an attachment and caused it to be levied upon its lands in the Territory in order to secure the satisfaction of any judgment he might finally obtain in such action—upon which point we express no opinion—it would not follow that a personal judgment could have been rendered against the company. In such case the judgment of the court could not affect anything except the lands attached. No personal judgment could have been rendered against the company by reason merely of such attachment.

It is contended that the case is covered by section 450 of the Compiled Laws of New Mexico, 1897. That section provides that: "In suits against any corporation summons shall be served in that county where the principal office of the corporation is kept, or its principal business carried on, by delivering a copy to the president thereof, if he may be found in said county, but if he is absent therefrom, then the summons shall he served in like manner in the county, on either the vice-president, secretary, treasurer, cashier, general agent, general superintendent or stockholder, or any agent of said corporation, within such time and under such rules as are provided by law for the service of such process in suits against real persons, and if no such person can be found in the county where the principal office of the corporation is kept, or in the county where it principal business is carried on, to serve such process upon, a summons may issue from either one of such counties, directed to the sheriff of any county in this Territory where any such person may be found and served with process. If such corporation keeps no principal office in any county,

and there is no county in which the principal business of such corporation is carried on, then suit may be brought against it in any county where the above-mentioned officers, or any or either of them, may be found: *Provided*, That the plaintiff may, in all cases, bring his action in the county where the cause of action accrued."

Counsel for appellant substantially concedes that this statute applies only to domestic corporations, that is, corporations created by or organized under Territorial enactments. But if it is to be assumed that these provisions could be made applicable to a corporation created by an act of Congress, and that for the purposes of suit such a corporation may be deemed a domestic corporation in any State or Territory which it might lawfully enter, still, it is evident that the above section cannot avail the plaintiff. The Santa Fe Railroad Company, when sued in the Territorial District Court, was not an inhabitant of the District within the meaning of the local statute; it had no principal or other office in the Territory; nor did it have an officer who could, in a legal sense, be "found" there; nor did it, in any just sense, carry on business in the Territory. The company simply owned lands there, and that fact was not sufficient by itself to bring the case within the provisions of the Territorial statute. This state of the law may sometimes operate injuriously upon those who may wish to sue the Railroad Company in the Territorial courts. But the situation cannot be changed by the courts. That can only be done by legislation.

For the reasons stated the judgment of the Supreme Court of the Territory must be

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.